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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-765

GULF OIL CORPORATION, *Petitioner*

v.

KENNETH LEHRMAN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Gulf Oil Corporation for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case.

1. Opinions Delivered in Courts Below

The United States District Court for the Western District of Texas, Waco Division, did not write an opinion in the first trial of this case. The opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the trial court's judgment as to Gulf's liability and reversed and remanded such judgment as to the amount of Plaintiff's damages is reported in 464 F.2d 26 (A copy of the pertinent part of that opinion is attached hereto as Appendix C). Upon retrial of the damage issue pursuant to the Court of Appeals' instructions, the United States District Court for the Western District of Texas, Waco Division, did not write an opinion. The opinion of the Court of Appeals affirming trial court's judgment on the damage issue and is reported in 500 F.2d 659. (A copy is attached hereto as Appendix B).

2. Jurisdictional Statement

The order by which rehearing was denied is dated November 5, 1974, and the judgment sought to be reviewed is dated September 11, 1974, but it was not issued until after consideration of the petition for rehearing. (Copies of the order and judgment are attached hereto as Appendix A). The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1254 of Title 28 of the United States Code, as well as the provision of Supreme Court Rule 19(1)(b).

3. Questions Presented

a. Whether the court's charge to the jury on the measure of damages in an antitrust case invited or permitted the jury to make an improper duplicative damage award.

b. Whether the jury should be informed of the treble damage feature of the Clayton Act, 15 U.S.C. 15.

c. Whether an antitrust plaintiff has met his burden of proof insofar as the measure of his damages is concerned if he does not produce "yardstick type" evidence as directed by the Court of Appeals in its first opinion.

d. Whether an antitrust plaintiff should be permitted to testify as to his age, health and desire to stay in business to evidence the duration of future profits.

e. Whether evidence based upon facts and events which occurred after an antitrust plaintiff abandons his business is admissible with regard to that plaintiff's measure of damages to his business.

4. Statutes Involved

The statute of the United States, the interpretation and application of which is involved, provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C.A. Sec. 15)

5. Statement of the Case[1]

During the period from 1959 to 1967, Respondent Lehrman operated a service station in Mart, Texas, and

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1. Footnote references are to a portion of the record below which has been transmitted to this Court by the Clerk of the Court of Appeals. References to Appendix Vols. I and II will appear as App. Vol. —, p. —.

sold gasoline under the Gulf brand name. After he abandoned that station in 1967, he brought an antitrust suit against Petitioner Gulf Oil Corporation. In the second trial in this case, which was limited to the measure of damages incurred by Respondent, the jury returned a verdict for $40,000.00 which was trebled by the court and judgment was entered in the amount of $120,000.00.

a. During the course of the trial the jury heard evidence and argument pertaining to future profits, goodwill value, going concern value, the value of stock and equipment and fair market value as such related to Respondent's service station business. Over Petitioner's objections,[2] the trial court instructed the jury that

> "Our law permits the jury to take into account both any damages which may have been inflicted on existing property and the damages which may have been sustained as a result of being unable to make profit which may reasonably could have been (sic) anticipated and would have been realized if it were not for the violation of the antitrust laws."[3]

Gulf believes that this charge has invited and permitted the jury to render an improper and duplicative damage award.

b. In attempting to prove his measure of damages, the Respondent did not submit evidence which met the requirements of either of the traditional theories of damages in an antitrust case—the "yardstick" or "before and after" theories. Although respondent sold three grades of gasoline at his place of business, Respondent simply showed pro-

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2. App. Vol. I, pp. 12-19, 42-43.

3. App. Vol. I, p. 35.

jected costs and sales volumes, and receipts for two grades of gasoline.

c. Gulf requested the trial court to instruct the jury that any damages it awarded would be trebled by the court.[4] Respondent opposed this request and the court refused, over Gulf's objection, to inform the jury of the treble damage feature provided for in the antitrust laws.

d. Over Gulf's objection, Respondent testified as to his age, health, and desire to stay in business to evidence the duration of future profits.

e. Over Gulf's objection, Respondent introduced evidence of events and facts which occurred after he abandoned his service station business to support his allegations of lost future profits.[5]

6. Reasons Relied on for Allowance of the Writ

1. Every other court considering a jury charge substantially similar to the one used by the trial court in this case, including the Eighth, the First and the Ninth Circuits and the District Court of the Southern District of New York, have reached the same conclusion, namely, that such a charge invites and permits a jury to award duplicative damages.[6] The contested portion of the trial court's charge reads as follows:

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4. App. Vol ___, pp. 20-21, 28-43.

5. App. Vol. ___, pp. 23-27.

6. *Albrecht v. Herald*, 452 F.2d 124 (8th Cir. 1971); *McGinnis Piano & Organ Co. v. Yamaha Int'l. Corp.*, 480 F.2d 474 (8th Cir. 1973); *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970); *Vandervelde v. Put & Call Brokers & Dealers Ass'n.*, 344 F. Supp. 118 (S.D.N.Y. 1972); *Simpson v. Union Oil Co. of Calif.*, 411 F.2d 897 (9th Cir. 1969); *Standard Oil Co. of Calif. v. Moore* 251 F.2d 188 (9th Cir.) *cert. denied*, 356 U.S. 975 (1958).

> "Our law permits the jury to take into account both any damages which may have been inflicted on existing property and the damages which may have been sustained as a result of being unable to make profit which may reasonably could have been (sic) anticipated and would have been realized if it were not for the violation of the antitrust laws."

The Court of Appeals has ruled that the above quoted language does *not* invite or permit duplicative damages. The effect of such a drastic departure from previous precedents should not occur without this Court's review.

The stated reasons underlying the Court of Appeals refusal to hold that the above quoted language was improper are as follows:

(a) Principles of sound judicial administration require that the charge be affirmed because an earlier panel of the Fifth Circuit Court of Appeals, in previously remanding this case, explicitly identified only one defect in the trial court's charge. "Until revised by higher authority," all panels of this Court should "respect" the quoted charge so that trial courts can feel secure in following the earlier panel's mandate,[7]

(b) The use of the charge in the second trial was "appropriate,"[8] presumably as a matter of law, and

(c) The use of the charge at the second trial was "clearly harmless to Gulf" because the appellate court drew inferences from the evidence which persuaded it that the word "property" in the charge referred only to "tools and equipment," though the

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7. References to the Opinion of the Court of Appeals appear as App. B, p._____. See App. B, p. 33.

8. App. B, p. 35.

> Court of Appeals while so ruling admitted that, despite the inferences, a "clarifying definition of property might have been appropriate."[9]

The Court of Appeals overlooked the uncertainty its opinion will create. It overlooks the reversible error it invites in the future trial of antitrust cases. Because of the admitted constraints placed on it by the first panel's "explicit" statement about the "only defect" in the charge, the Court of Appeals overlooked, misapprehended or ignored the plain, simple, common, everyday meaning and effect of the words "both," "property" and "and" used in the above quoted portion of the jury charge.

Unless a jury hearing this charge is given the necessary clarifying definition of the word "property," this charge permits it to award two separate, distinct and independent items of damage to a Plaintiff, just as certainly as if Special Interrogatories as to these two matters had been submitted to it. The Court of Appeals recognized this possibility but in its effort to observe "principles of sound judicial administration" avoided the issue by seeking out and relying on inferences or innuendoes in the evidence and argument of counsel to conclude that the "property" reference was to "tools and equipment" and thus concluded that Petitioner Gulf suffered no harm on this account. Petitioner submits that the Court of Appeals simply begged the question by resorting to inference or innuendo to support this jury charge. The question for this Court to decide is whether the plain, accepted, common, everyday meaning of the words "both," "property" and "and" set out in the charge have the effect of inviting and permitting a double recovery. If they do, giving the

9. *Ibid.*

charge constitutes reversible error unless clarifying or qualifying language be employed to inform the jury that the word "property" was being used by the court in the limited sense of meaning "tools or equipment" only. *Albrecht v. Herald Co., supra.*

The word, "property," without any clarifying of limiting definition, encompasses within its meaning all types of property: real, personal or mixed. *Webster Dictionary*, Second College Edition, p. 1139. "Property" is a word of common and general usage and is used to describe or include numerous classifications of estates and possessions. For example, the term embraces the concept of a home, a business, inventions, real estate, ranches, tools, equipment, etc., etc. It does not have a restricted or qualified meaning, and it was not qualified or restricted by the proof or argument offered during the trial of this cause. Presumably, because the Court of Appeals felt that it was "constrained by the strong policy against continuous relitigation"[10] and because principles of sound judicial administration required support of that Court's dicta in the prior appeal,[11] that Court drew unwarranted inferences that the term "property," in the context of this record, meant only loss of value to "tools and equipment." In so ruling, the Court of Appeals overlooks or misapprehends the direct and contradictory testimony and argument offered on both sides of this case, which focused on and emphasized the damage, if any, to Plaintiff's *entire* business enterprise or property. The issues of market value, going concern value, value of personal property, value of his lease, loss of future profit potential, all were contro-

10. App. B, p. 31.

11. App. B, p. 33.

verted and the subject of argument before the jury. Not only did Gulf's witnesses testify on these items of damage, but also the Plaintiff's witnesses, Brown and Simpson, testified that Plaintiff's business enterprise generally and his lease in particular had "some" going concern or market value, although they were unable to put any specific value on these items.[12] The Court's opinion that no "duplicative inference" can be drawn from the record is unwarranted and, frankly, it overlooks this evidence or misapprehends the impact it had on the jury. This jury, on the basis of this record, may very well have disagreed with Gulf's proof regarding loss of good will or market value and concurred with witnesses Brown and Simpson and made its award on that basis.

By stating that the jury charge was "appropriate," despite the omission of a clarifying definition of "property," the Court of Appeals reduces further litigants in antitrust damage cases to a state of utter uncertainty and confusion as to the proper measure of damages in this type of case.

Assuming *arguendo,* that the trial court's failure to give a clarifying definition of "property" was, in fact or in law, harmless to Appellant, if, as the Court of Appeals states, principles of sound judicial administration are to be forged and honored so that trial courts and, presumably, trial lawyers can be secure in following the mandates of appellate courts, the Court of Appeals Opinion, as written, should be modified or clarified. Future litigation in any area of the country cannot be conducted with any assurance against reversal of the above quoted charge of the trial court. If trial judges consider this type of charge

12. App., pp. 268-270 and 451-478.

appropriate, who can predicate whether a jury's verdict, based thereon, can withstand an appellant's attack. Such cases must be appealed to determine: (1) If the evidence supports a conclusion that no duplicative inference was to be drawn, (2) If a clarifying definition of "property" was essential to protect the defendant against a duplicative award, (3) Whether the failure to request a clarifying definition of "property" would waive the right to attack a charge which did not include such a definition.

This decision cannot and will not impart the desired feeling of security. That the Court of Appeals seeks to achieve by adhering to "an earlier panel's mandate." When an acceptable or reasonable alternative is open and available, litigants and trial courts must not be left to rely upon inferences or innuendoes. Should this Court sanction the continued use of a jury charge which, given the plain meaning and thrust of words such as "both," "property" and "and," invites and permits a jury to award simultaneously two separate, distinct and independent items of damage, viz., loss of the business' market value (including value of tools and equipment) *and* the loss of future net profits? Courts in other circuits have recognized that the use of susbtantially similar jury charges constituted reversible error. *Albrecht* v. *Herald*, and cases cited in footnote 6, *supra*. The Court of Appeals opinion is diametrically opposed to the law announced in *Albrecht*, *McGinnis*, *Farmington*, *Vandervelde* and *Simpson* a course which invites future litigants, jurors, and trial courts into error. This Court should resolve this conflict and should decide that such a definition is mandatory and that it does not depend on the evidence.

To the extent that the Court of Appeal's comments, in footnote 21, about the *de minimis* nature of Gulf's objec-

tion to the duplicative damage instruction which may have influenced that Court, Gulf directs this Court's attention to the following facts which apparently were overlooked or ignored by the Court of Appeals. First, two weeks prior to trial, Gulf prepared, presented and filed with the trial court a suggested jury charge. Each and every element of damage that a jury could legally consider was set forth in plain, concise and unambiguous terms. Each element of the charge was annotated and supported with the relevant and extant case authority.[13] Gulf's suggested charge cannot reasonably be interpreted as anything but a specific objection to the charge given in the first trial. Secondly, immediately at the close of the evidence in the second trial, the trial court verbally charged the jury and simultaneously distributed a typed copy of his charge. Neither counsel had the opportunity to read or object *prior* to the charge being read. *After* the jury left to deliberate, the Appellant was permitted to dictate objections to the charge and stated quite specifically with regard to the *duplicative* nature of the charge:

> ". . . as far as net profits are . . . concerned, the jury should not only be instructed that this is a factor to be considered in estimating what the market value of a business is . . . Gulf's suggested charge takes the approach of *Standard Oil of California v. Moore* . . . and *Albrecht v. Herald Co.*"[14]

Albrecht and *Moore* were cited to the Court in Gulf's suggested charge. These cases are clear holdings that it is error to invite or permit a jury to grant recovery for damages to an existing business or property *and* damages occa-

13. App. pp. 12-21.

14. App. p. 42.

sioned by the loss of future profits. Thirdly, in Gulf's Motion for a New Trial, the first ground of error alleged as the basis for a new trial was the duplicative damage issue.

Turning to the Court of Appeals' holding of "harmless error," can it be reasonably and fairly held that the trial court's omission of a clarifying definition of "property" was harmless to Gulf, when Gulf prepared the defense on this case and presented testimony on the total value of Lehrman's business enterprise or property? Gulf did not restrict its evidence to the loss, if any, to the market value of Lehrman's tools and equipment. Gulf's case attacked the plaintiff's allegation of damage to property of whatever kind. The reported case law which Gulf cited and relied upon clearly holds that a Plaintiff cannot recover *both* the loss of the market value of his business (which would include the value of tools and equipment) *and* the damage occasioned by the inability to earn future profits. Under certain circumstances, courts have held that the loss of future profits may be the only practical way to measure the damage to a Plaintiff's business within the meaning of the statute. (Contrary to the Court of Appeals' statement.[15] Gulf did *not* contend that going concern or market value was the *only* measure of damages.) To the extent that this misapprehension of Gulf's position might have influenced the Court in its consideration of this appeal, Gulf states and the record supports that it has contended from the day it submitted its suggested jury charge to the trial court that a Plaintiff in an antitrust suit may not recover *both* loss of future profits *and* loss of market of going concern value of his business. Since the fair and

15. App. B, p. 31.

clear inference of the above quoted language of the charge is that duplicative damages were invited by the Court, and subsequently awarded. Plaintiff's damages were, in effect, sextupled instead of trebled. This is the reason Gulf contends that the verdict is improper.

The approval of a charge as the one before this Court not only invites error for future litigants, but also, it frustrates the purpose sought to be attained by this Court, the establishment and attainment of sound principles of judicial administration in the decision making process.

2. In holding that informing the jury of the treble damage feature of the Clayton Act, "serves no useful function" and is "potentially harmful", the Court of Appeals has overlooked the fact that jurors are aware of the treble damage feature and that without appropriate instructions concerning those damages, jurors will be confused and will render improper verdicts. It is unrealistic to think that all jurors are ignorant of the impact of the antitrust laws. For example, recent stories about the IBM and General Telephone antitrust litigation have covered the front pages of local as well as national newspapers and periodicals and have been carried by both the major TV networks and local TV stations. It is inevitable that at least some of the jurors are aware of treble damage antitrust litigation before they are actually chosen for a panel in such a case. The jury must be told that their function is to determine only the amount of damages to a Plaintiff's business or property and that the Court will treble those damages and award attorneys fees.

Failure to instruct the jury on the treble damage feature marks a departure from the modern and enlightened trend toward fully informing the jury of the law and the effect of its answers. As stated in 9 WRIGHT & MILLER,

FEDERAL PRACTICE AND PROCEDURE § 2509 at 513 (1971):

> ". . . an attempt to keep the jury in the dark as to the effect of its answers, is likely to be unavailing, and there is always the danger that *the jury will guess wrong about the law. . . .*"[16]

This Court's decision effectively blindfolds the jury to an important and relevant portion of the governing statute. In other areas of the law, this is not the practice. In cases pertaining to the Federal Employers Liability Act, the Labor Management Relations Act, the Federal Criminal Statutes, and the Internal Revenue Code, the jury is informed of the governing law.[17] In cases involving Federal regulatory statutes, it is not only sound judicial policy to inform the jury of the statutory law upon which the action is based, but it is essential in order to prevent confusion,

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16. See also J. BROWN, FEDERAL SPECIAL VERDICTS: THE DOUBT ELIMINATOR, 44 F.R.D. 338, 341; E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS, § 1906 at 281-282 (1965); "Private Treble Damage Antitrust Suits: Measure of Damages for the Destruction of All or Part of a Business," 80 HARV. L. REV. 1566, 1569 n.20 (1967).

17. See *Batsell v. United States*, 403 F.2d 395, 400 (8th Cir. 1968), *cert. denied* 393 U.S. 1094 (1969) "'The Court may and generally should, where the law governing a case is expressed in a statute, employ the language of the statute in its instruction.'" *Williams v. United States*, 328 F.2d 256 (8th Cir. 1964); *Maynard v. United States*, 215 F.2d 336, 339 (D.C. Cir. 1954). "Even in criminal cases, it is held as a general rule that where the law governing a case is expressed in a statute the *Court in its charge should use the language of the Statute*;'" *LaBarge Water Well Supply Co. v. United States*, 325 F.2d 798 (8th Cir. 1963); *Terminal Railroad Association of St. Louis v. Howell*, 165 F.2d 135 (8th Cir. 1948). "'It would be strange indeed if it could be said to be error to lay down the law in the exact language of the statute upon which the action is based;'" *Fritz v. Pennsylvania Railroad Company*, 185 F.2d 31 (7th Cir. 1950); *United Electrical R. & M. Workers v. Oliver Corporation*, 205 F.2d 376 (8th Cir. 1953).

misunderstanding and the threat of an erroneous and unenlightened verdict. Recognizing that the principal purpose of the treble damage provision is to deter antitrust violations and that such provision is punitive in nature is all the more reason that the *jury should be fully informed that it is the duty of the judge, not the jury, to perform the mandatory trebling,* and that the jury only determines the amount of compensatory damages. The jury's purpose in an antitrust case is *not* to punish the antitrust violator, it is simply to determine the amount of damages to the plaintiff's business or property.

Because of the division of authority on the question of giving an instruction on the treble damage provision, which has been recognized by the Court of Appeals,[18] this Court should consider the question of instructing the jury as to the treble damage feature of the Clayton Act.[19]

3. The Court of Appeals has liberalized and minimized an antitrust plaintiff's burden of proof on the damage issue to an extent not heretofore contemplated or approved by this Court or by other Circuit Courts. Prior to this decision, if an antitrust plaintiff was unable to commence his business enterprise because of the defendant's antitrust restraints, or if he was unable to establish a "track record"

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18. App. B, p. 37.

19. Additional authorities favoring informing the jury of the treble damage provision of the antitrust law include *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 1961 C.C.H. Trade Cases, ¶ 70,051 (E.D. Pa. 1960); *Woods Exploration and Producing Co. v. Aluminum Co. of America* (C.A. No. 14,669 S.D. Tex. Hou. Div. 1962); *Carpa, Inc., et al v. Ward Foods Inc.* (W.D. Tex. C.A. No. CA-71-CA-19); *City of San Antonio v. Westinghouse Electric Corporation, et al* (W.D. Tex., C.A. 3064, September 9, 1964); *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa., 1973); *Cape Cod Food Prod. v. Nat'l Cranberry Ass'n*, 119 F. Supp. 900 (D.C. Mass. 1954).

for his enterprise because he labored under antitrust restraints, courts required him, in the proof of damages, to present financial data based upon the experience and history of a business identical or substantially similar to the plaintiff's type of business. This is the type of evidence courts have considered "just and relevant estimates of damage." The Court of Appeals recognized this when it said that "our first decision clearly contemplated the use of 'yardstick type' evidence" by the Plaintiff in the second trial.[20]

The only evidence offered by this Plaintiff that may be considered as "yardstick evidence," i.e., evidence that concerned an identical or substantially similar business to that of the Plaintiff was the testimony and exhibits offered by Plaintiff's bookkeeper.[21] The Court of Appeals has refused to decide or give any indication of whether this evidence was admissible under the rules of evidence which pertain to the admissibility of "yardstick" type evidence. In sidestepping this issue, the Court stated:

> "We need not decide whether Brown's station and Lehrman's are sufficiently similar to allow collation of profits because the data from Brown's station was not used in that manner."[22]

Nevertheless, the Court went on to analyze and comment upon the expense data of the Brown service station and remarked "the precise impact of the Brown expense figures was not clear."[23] The conclusion is inescapable that Plain-

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20. App. B, p. 27, 42; App. C, p. 59.

21. App., Vol. 2, pp. 84-87. Exhibits 36 and 47-A.

22. App. B, p. 43.

23. *Ibid.*

tiff's bookkeepers "collation" was not a yardstick of anything; neither of income, expense, nor profit. What, then, is the measure and thrust of the Court's mandate that the Plaintiff use "yardstick" type evidence in his proof at the second trial? If Brown's Temple, Texas, service station is not a proper "yardstick," where, then, in this record is evidence of this nature? It cannot be Plaintiff's own past experience (i.e. "before and after") because the Court of Appeals has held that the Plaintiff's business did not operate for a sufficient length of time free of antitrust restraints to permit a fair assessment of his financial data.[24] It cannot be "the other stations whose expenses were correlated" by Plaintiff's bookkeeper because there was no predicate laid by the Plaintiff for the introduction of those businesses' financial data. No doubt it was the Court of Appeals realization of the obvious substantial dissimilarities between Plaintiff's and Brown's business enterprises and further its realization that the Brown business enterprise came into existence many months after Plaintiff closed his business that mitigated against that Court's deciding specifically that the "yardstick" evidence offered by the Plaintiff could support the jury verdict.

Even though the Court of Appeals expressly repudiated the idea that the Plaintiff's bookkeeper's collated data was used to project income or profits,[25] it overlooked the obvious impact that this inadmissible evidence had on the jurors who heard the testimony and reviewed the exhibits which were offered in connection with it, namely Exhibits 36 and 47-A. This testimony and these exhibits are the only place in the record where any specific projections of profit figures are made. As a matter of fact, the impact and

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24. App. B, p. 12, footnote 47.

25. See Note 3, *supra*.

effect of these exhibits was felt by the Court of Appeals. Thus, in the face of the Court of Appeals' explicit statement that Plaintiff's bookkeeper's projections "correlated to Brown's Temple service station . . . were not used to project profits," the Court of Appeals specifically relies on these very profit figures to drive home its point that "the jury's verdict has a firm basis in Lehrman's projection of the lost profits."[26]

If the record is stripped of Lehrman's bookkeeper's testimony and his unwarranted assumptions as to future income, expense and profit appearing on Exhibits 36 and 47-A, the "just and relevant data" supporting the jury's verdict boils down to Plaintiff's testimony and that of his neighbor, the operator of a self-service station nearby, to the effect that Plaintiff if free to price competitively, could pump a certain volume of gasoline. Neither Plaintiff nor any other witness attempted to project what margin of profit, if any, he might enjoy in his effort to attain the projected volume figures. Further, not a single witness, except Plaintiff's bookkeeper purported to project the expenses which might be incurred by Plaintiff in the realization of the sale of such volumes.

It is true that the courts have adopted an extremely liberal, generous, and charitable attitude in their review of an antitrust plaintiff's proof of damage. However, no court to date has minimized or liberalized that burden to the extent that the Court of Appeals for the 5th Circuit has done in its Opinion in this case. The affirmation of

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26. App. B, p. 47, footnote 60, where the Court states, "For example, according to some of the evidence, if Lehrman, a man of thirty-five at the time of the second trial, had operated the station for ten years at a volume of 20,000 gallons per month with a five cent dealer margin, his projected profits were estimated to be $77,480." This profit figure is taken directly from Exhibit 47-A which was prepared by Lehrman's bookkeeper.

this jury verdict is based solely on the Plaintiff's proof that he could attain a projected sales volume of two grades of gasoline. There is a complete lack of competent and responsible financial data concerning the projected business operations of the Plaintiff. There was no offer of opinion evidence by any competent financial analyst with respect to the data that was offered in evidence. There is no operational or financial data in evidence that can be tied or related to a "yardstick" business identical or similar to that of the Plaintiff. In short, there is no legal basis which supports the jury's verdict. In affirming this verdict, the Court of Appeals has unduly liberalized and diluted the previous Court imposed standards of evidence required of a plaintiff in an antitrust case. This departure from prior standards should be reviewed by this Court.

4. Permitting Plaintiff's testimony as to his age, health and *desire to stay* in business to evidence the appropriate duration of future profits in this antitrust case, marks significant departure from established precedent. The Court of Appeals acknowledges that its holding is directly contrary to *Standard Oil Company of California v. Moore*, 251 F.2d 188 (9th Cir.) *cert. denied* 356 U.S. 975 (1958).[27] In an antitrust case, the measure of damages is the amount of damage to the successful plaintiff's business or property.[28] Damages to "business or property" must be and have been distinguished from personal injuries, as no recovery for personal injuries is authorized by the Clayton Act. A personal injury theory of damages or evidence relating to personal characteristics of the plain-

27. App. B. p. 46.

28. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); In Re Multi District Vehicle Air Pollution 1973 CCH Trade Cases at 74,540 (9th Cir. 1973).

tiff is in no way relevant to the question of damages in an antitrust case. See *Simpson v. Union Oil Company of California*, 411 F.2d 897 (9th Cir. 1969). Permitting Plaintiff's testimony about his personal characteristics to support a damage award based on duration of future profits, truly opens a Pandora's Box and effectively changes the law in an antitrust case. The injury, which is compensable in an antitrust case, is to a plaintiff's business or property and that measure of damage has no relationship whatsoever to the plaintiff's age, health and desire to stay in business.

5. All of the evidence offered by plaintiff as to the future net profit potential of his business was based on events, facts and business developments which occurred after he left his service station business.[29] The projections based on Bill Brown's service station should have been excluded since that business did not even exist on the date Plaintiff left his station. This same type of proof was offered and rejected in *Standard Oil Co. of Calif. v. Moore*, *supra* at 221. The Ninth Circuit pointed out that testimony as to the measure of the injured plaintiff's damages based "in part upon certain events, facts and business developments subsequent to" the date Moore's service station business was destroyed was inadmissible. See *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1928); *City of New York v. Sage*, 239 U.S. 57 (1915). The Court of Appeals has expressly refused to follow the holding in *Standard Oil Co. of Calif. v. Moore* and has approved the admission of evidence of facts and events which occurred after Lehrman left his business. This Court should resolve this conflict.

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29. App. Vol. I, p. 23-27.

30. App. B, p. 45.

CONCLUSION

Wherefore, Gulf Oil Corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case.

Respectfully submitted,

JOHN E. BAILEY
CATHERINE C. MCCULLEY
Attorneys for Gulf Oil Corporation, Petitioner

By_____

CERTIFICATE OF SERVICE

I, Catherine C. McCulley, hereby certify that a correct copy of the foregoing petition for writ of certiorari was served on counsel for Kenneth Lehrman, Mr. Jack N. Price, P. O. Box 511, Longview, Texas 75601, by depositing a copy of the same, postage prepaid, in the United States mail this_____day of December, 1974.

_____

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2822

D. C. Docket No. CA-68-4-W

KENNETH LEHRMAN, Plaintiff-Appellee,

versus

GULF OIL CORPORATION, Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before GEWIN, THORNBERRY and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 11, 1974

Issued as Mandate:

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

November 5, 1974

TO ALL COUNSEL OF RECORD

Re: 73-2822
LEHRMAN v. GULF OIL CORPORATION

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ ANNE G. PARENT
Deputy Clerk

cc: Mr. John B. McNamara, Jr.
Messrs. W. B. Edwards
John E. Bailey
Ms. Catherine C. McCulley
Mr. Jack N. Price
Mr. Charles M. McDonald

APPENDIX B

Kenneth LEHRMAN, Plaintiff-Appellee,

v.

GULF OIL CORPORATION, Defendant-Appellant

No. 73-2822

United States Court of Appeals

Fifth Circuit

Sept. 11, 1974

A former service station operator brought a treble damage antitrust action against an oil company. A retrial after a former appeal, 464 F.2d 26, was conducted in the United States District Court for the Western District of Texas at Waco, Jack Roberts, J., and resulted in a verdict for the plaintiff. The defendant appealed. The Court of Appeals, Gewin, Circuit Judge, held that future profits were an appropriate measure of damages, that instructions did not permit duplicative damages to be awarded, that a treble damage instruction was not necessary, and that omission of a present value instruction was not a ground for reversal. Also, plaintiff's evidence was not immaterial, irrelevant or prejudicial, nor was it unduly speculative or conjectural, and the jury's verdict was not excessive.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before GEWIN, THORNBERRY and RONEY, Circuit Judges.

GEWIN, Circuit Judge:

I

This is the second appeal in this case, and we are now concerned only with the issue of damages. The first appeal arose out of a treble damage antitrust action filed by Mr. Kenneth Lehrman under Section 1 of the Sherman Act[1] against the Gulf Oil Corporation (Gulf) alleging that Gulf's complicated system of setting wholesale prices for its gasoline was used as a mechanism for fixing the retail prices at which station operators like Lehrman resold the gasoline. He alleged that these illegal pricing policies drove him out of his service station business in Mart, Texas, by making it impossible for him to compete with the prices charged by other stations in his area.[2] After the initial jury trial a verdict was returned in Lehrman's favor in the amount of $60,000 in compensatory damages, but the district court set aside this verdict, reduced the award, and entered a judgment for Lehrman for the sum of $21,000-$63,000 trebled.

Gulf appealed to this court[3] raising the questions of

1. 15 U.S.C. § 1.

2. The facts of this controversy have been thoroughly detailed in an opinion resulting from the prior appeal, and little purpose would be served by repeating them here. *See* Lehrman v. Gulf Oil Corp., 464 F.2d 26, 29 (5th Cir. 1972).

3. Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir. 1972).

jurisdiction and liability. Both parties to the previous appeal complained of the district court's treatment of the damages assessed against Gulf. This court concluded that the district court did not lack subject matter jurisdiction and that Gulf was indeed liable for an antitrust violation. We found it necessary, however, to remand the cause for further proceedings restricted to the question of the proper measure of Lehrman's damages. Although our opinion emphasized the principle that courts are "to take a charitable view of the difficulties of proving damages in a case when a treble-damage plaintiff must try to prove what would have accrued to him in the absence of the defendant's anticompetitive practice," it was concluded that "we must at least insist upon 'a just and reasonable estimate of the damage based on reasonable data.' "[4]

Specifically, on the first appeal this court found that there should have been an allowance in the original jury verdict for mitigation of Lehrman's damages by the amount of his earnings in his current line of work.[5] Moreover, it was determined that the district court's remittitur was inappropriate. Without noting any other specific criticism of the evidence on damages we offered the following observations in the concluding portion of the opinion:

> At the new trial, Lehrman may introduce additional evidence to provide the jury with a better "yardstick" to measure Lehrman's losses. There may be additional evidence to clarify the possible length of Lehrman's future tenure in the station and therefore the appropriate duration of future profits. Additional

4. *Id.* at 46 (citation omitted).

5. *Id.* at 46. Failure to instruct the jury to include such a deduction was labeled "the only defect in the lower court's charge to the jury." *Id.* at 47.

> evidence will likely be necessary to provide some measure of the deduction from Lehrman's damages which must be attributed to the present and future earning capacity he now has which he would not have enjoyed had he continued to look chiefly to the station for his income and to devote most of his time to its operation.

With our former opinion as a guide the case was retried on the damage issue only. Lehrman attempted to remedy the specially enumerated defect in his prior proof by introducing evidence of his alternative sources of income. A second jury returned a verdict for $40,000 and a treble damage judgment of $120,000 was entered by the court. Gulf has appealed again, and today we must decide whether Mr. Lehman's efforts on retrial to prove his damages comply with standards prescribed by our previous opinion and by sound precedent. We feel that they do and affirm.

II

[1, 2] Before addressing Gulf's contentions, however, we should briefly discuss the "law of the case" doctrine which plays an important role in subsequent appeals. This laudable and self-imposed[6] restriction is grounded upon the sound public policy that litigation must come to an end. An appellate court court cannot efficiently perform its duty to provide expeditious justice to all "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent

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6. Zarzaur v. United States, 493 F.2d 447, 453-454 (5th Cir. 1974). Although the federal courts generally refuse to reopen issues that have been previously decided on appeal, it is within their power to do so. 1B J. Moore, Federal Practice ¶ 0.404 [10], at 573 (2d ed. 1974); 9 J. Moore, Federal Practice ¶ 110.25 [2], at 275 (2d ed. 1973).

appeal."[7] Not only does the doctrine promote judicial efficiency but it also discourages "panel shopping" at the circuit level, for in today's climate it is most likely that a different panel will hear subsequent appeals.[8]

Nevertheless, there are important boundaries to the scope of the doctrine. In the federal courts, for example, the law of the case does not carry the same consequences as the rule of res judicata; it does not preclude a second review if considerations of substantial justice warrant it.[9] More important to the instant case is the limitation that the doctrine does not include all questions which were present in a case and which might have been decided but were not.[10] As a general rule if the issues were decided, either expressly or by necessary implication, those determinations of law will be binding on remand and on a subsequent appeal.[11]

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7. White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967) recently cited with approval in Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19 (5th Cir. 1974).

8. Zarzaur v. United States, 493 F.2d 447, n.15 (5th Cir. 1974).

9. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19 (5th Cir. 1974); 1B J. Moore, Federal Practice ¶ 0.404 [1], at 405-06 (2d ed. 1974) (not res judicata); 9 J. Moore, Federal Practice ¶ 110.25 [2], at 275 (2d ed. 1973) (Reconsideration may be warranted). *Also see* note 6, *supra*.

10. Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 136, 41 S.Ct. 276, 65 L.Ed. 549 (1921); Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19 (5th Cir. 1974); Connett v. City of Jerseyville, 110 F.2d 1015, 1018 (7th Cir. 1940); 1B J. Moore, Federal Practice ¶ 0.404 [10], at 573 (2d ed. 1974).

11. Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., 430 F.2d 38, 48 (5th Cir. 1970). Of course if as *Diplomat Electric* points out, a subsequent panel considers the legal decision clearly erroneous then reconsideration may be warranted as explained in the text accompanying note 9, *supra*. Also *see* Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir. 1974); 1B J. Moore, Federal Practice ¶ 0.404 [10], at 573 (2d ed. 1974).

III

Gulf has massed a repetitive and caustic assault upon Lehrman's case, but its contentions can be distilled into three broad categories: (1) improper jury instructions; (2) the admission of allegedly improper evidence, particularly "yardstick" evidence; (3) the allegedly undue speculation on which the jury verdict is based. The jury instructions are asserted to be deficient in four respects: (1) going concern value should be the only measure of damages, not future profits; (2) the jury should be instructed on the present value concept; (3) the charge allowed the jury to award duplicative damages; (4) an instruction on treble damages should have been given.

[3] The first of these assertions—inappropriateness of future profits as a measure of damages—is clearly without merit. Initially, we feel that the law of the case has been clearly established here. Gulf objected to the use of future profits on the first appeal but we rejected the challenge and stated:

> Gulf raises several objections to the damage calculation. First, it objects to the use of future profits as a measure of Lehrman's damages because, it contends that allowing Lehrman to recover for future profits would enable a proprietor who has been the victim of a single anticompetitive practice to walk away from his business and collect damages for future profits despite the possibility that the business might still be operated successfully. Gulf stresses that the cases which have allowed future profits as a measure of antitrust damages have been cases involving refusals to deal, or cancellation of leases, both of which practices rendered it impossible for the proprietor who had been damaged to continue in business.

> We do not accept Gulf's restrictive application of the principle of future profits as antitrust damages. (footnote omitted)[12]

Indeed, *Lehrman* is cited in Terrell v. Household Goods Carriers' Bureau[13] as support for the proposition that lost future profits are an appropriate measure of damages.

[4, 5] Even if we did not feel constrained by the strong policy against continuous relitigation we would still reject Gulf's contention on the merits. Clearly, going concern value and lost future profits are each viable alternative measures of antitrust damages.[14] Future profits cannot be condemned as inordinately more speculative than the going concern value since the former is a crucial component of the latter. In addition going concern or goodwill value may present difficult problems of proof if the lessor of a particular station places restrictive conditions on the transfer of the lease.[15] Finally, future profits accompanied by

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12. 464 F.2d 26, 44-45 (5th Cir. 1972).

13. 494 F.2d 16, n.12 (5th Cir. 1974).

14. *Id.;* Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harv.L. Rev. 1566, 1577 (1967). We, of course, realize that because future profit potential is a principal element of a firm's going concern value an award should not include both. Albrecht v. Herald Co., 452 F.2d 124 (8th Cir. 1971). Also see the discussion at p. 7632, *infra*.

15. *Cf.* Frank Coulson, Inc.—Buick v. General Motors Corp., 488 F.2d 202 (5th Cir. 1974). Restrictions might include approval of future transferees and attempts to influence transfer price. *Id.*

The evidence indicates that Lehrman's lease was of the "evergreen" variety, so designated because they are customarily renewed from year to year. Upon this record the jury could easily conclude that though there was a theoretical possibility of early termination by Gulf, in the practical business context it would be much more likely that the lease would be continuously renewed throughout his career. *See* Note, Private Treble Damage Antitrust Suits, *supra* note 14, at 1578.

an award for any decline in asset values will often more fully compensate a businessman by measuring his lost earnings, not just what it is worth to someone else to reach for those earnings.[16]

[6] Gulf also claims that the jury should have been instructed to award only the present value of lost future profits, and we agree that this would be the better practice. But we do not find this issue raised in Gulf's objection to the court's charge. Even assuming the matter is properly preserved we find the error harmless in light of the complex proof.

[7-9] Pointing to the following instruction, Gulf assigns as a third defect the contention that the court permitted the jury to award duplicative damages:

> Our law permits the jury to take into account both any damages which may have been inflicted on existing property and the damages which may have been sustained as a result of being unable to make profit which may reasonably could have been (sic) anticipated and would have been realized if it were not for the violation of the antitrust laws.

Of course, 15 U.S.C. §15 provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor.

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16. *See* Note, Private Treble Damage Antitrust Suits, *supra* note 14, at 1581. Gulf asserts that personal factors are clearly inappropriate for consideration here just as they are in eminent domain proceedings. This analogy, however, ignores the different public policies at work in eminent domain and in antitrust suits. Factors which are speculative and appeal to sympathy are excluded in eminent domain proceedings to avoid an undue drain on the public treasury. Arguably in the private enforcement of our antitrust laws a more liberal test of damages should apply. *Id.* at n. 80.

. . ." But Gulf contends that the above quoted instruction by the district court permits the jury to award damages for both lost future profits and going concern value. Courts have recognized that future profits are a principal element in going concern value.[17] Thus, it is clear that an award including both is inappropriately duplicitous.

Before examining the instruction to see whether it permits such duplication we should consider the possible application of the law of the case. The allegedly duplicative and defective instruction was quoted at length by this court on the first appeal.[18] Our decision expressly stated that the only error in the charge was the failure to instruct the jury to deduct a reasonable amount attributable to Lehrman's earnings after leaving the gas station business.[19] Since we decided to reverse because the instructions did not include that mitigating factor our conclusion as to the absence of other defects may not have been absolutely necessary, but it was explicit.[20]

Principles of sound judicial administration require that when a Court of Appeals identifies the only defect in a trial court's charge, the trial court should feel secure in following that mandate, confident that until revised by higher authority it will be respected by all panels. Nevertheless, Gulf maintains that a re-trial on damages is an entirely new "ball game." Second, it suggests that the court's statement is of little importance because Gulf did

17. Albrecht v. Times Herald, 452 F.2d 124, 129 (8th Cir. 1971).

18. Lehrman v. Gulf Oil Corp., 464 F.2d 26, n.14 (5th Cir. 1972).

19. *Id.* at 47.

20. *See* text accompanying note 11, *supra*.

not specifically direct the court's attention to the language awarding duplicative damages.[21]

Gulf's position that a re-trial on damages wipes the slate clean is clearly inaccurate as to matters of law as we have previously explained. Gulf's second argument presents a closer question. As noted, the doctrine of the law of the case applies only to the issues decided, not to all those presented for decision but left unanswered.[22] A strong argument can be made that this court's express statement decided the present jury instruction issue even though it was not argued or briefed. Even if we should agree, however, that the court's explicit pronouncement on the trial court's instruction was premature and should not be strictly followed because argument was not presented, it would not change the result here because we find the instruction appropriate.

The instruction does not allow duplicative damages if property loss is taken to mean loss on tools and equipment.[23] Although Lehrman indicated he was "satisfied" with the sales price he received for his tools there is some evidence that they might have been worth more.[24] Only if

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21. Not only did Gulf fail to raise the issue on the first appeal but in its brief on the first appeal it was intimated that the court correctly charged the jury that injury may be to business or property. Furthermore, Gulf again failed to specifically object to this portion of the charge at the second trial. While we are aware that legal issues rarely permit instant analysis we feel that the timing of this objection gives some indication of its *de minimis* nature.

22. *See* note 10, *supra*.

23. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 567, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

24. Lehrman allegedly received less than the depreciated tax value on the tools. Also there is no indication that his equipment was not in proper functioning order.

property[25] is considered to be inclusive of the going concern value of the station would the instruction permit a duplicative award. Going concern value, of course, is drawn heavily from the business community's estimate of future profit potential. But it is clear here that no duplicative inference was to be drawn. In light of the entire instruction and counsel's argument it is clear that lost profit was virtually the exclusive element of damage. Lehrman opposed references to going concern value at every turn. Given this particular phrasing a clarifying definition of property[26] might have been appropriate, but its omission here was clearly harmless to Gulf.

The fourth objection to the instructions is that the court committed reversible error when it refused to instruct the jury that any jury verdict would be trebled by the court under section 4 of the Clayton Act.[27] Gulf contends that the instruction is necessary because "the jury should know what the law is." Defendants generally desire such an instruction hoping it will tend to lower the verdict.[28] Plain-

25. For a discussion of the definition of business or property under the antitrust statutes *see* Martin v. Phillips Petroleum Co., 365 F.2d 629 (5th Cir. 1966).

26. *See* Cape Cod Food Products v. National Cranberry Ass'n, 119 F.Supp. 900, 911 (D. Mass. 1954) where almost identical language was used in the damage instruction. The court endeavored, however, to further explain the phrase.

27. 15 U.S.C. § 15 provides, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

28. In fact it has been argued that the mandatory nature of treble damages results in some unfortunate and counterproductive resistance to private antitrust actions. Note, Private Treble Damage Antitrust Suits, *supra* note 14, at 1569.

tiffs naturally fear just such a result. Gulf argues that this circuit has given its tacit approval to a treble damage instruction by quoting in a footnote in North Texas Producers Ass'n v. Young[29] an instruction including such language. Although the charge in *North Texas* informed the jury of the treble damage provision, the judgment was for the plaintiff. The plaintiff-appellee was apparently satisfied with his verdict, and the defendant-appellant had little reason to object. Thus the court had no reason to scrutinize the charge for items that would arguably harm the plaintiff and aid the defendant. This issue was not presented to the court for review.

[10] In the present case by contrast, the treble damage instruction was not given, and had it been given it would arguably aid the losing party, Gulf. Yet the only defect in the damage instruction identified by our previous opinion was the failure to allow for the mitigation of damages by the amount of Lehrman's earnings after he left the station. As with the question of duplicative damages Gulf reasons that the failure of the court to specifically address the question on the first appeal gives the court's approval of the instruction a limited effect.[30] Similarly, we again emphasize that instructions once approved on appeal generally should be given with confidence on remand;[31] but to so hold is unnecessary because assuming it is appropriate to reach the merits of the treble damage argument, we reject it.

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29. 308 F.2d 235, n.5 (5th Cir. 1962).

30. Like the duplicative damages contention this treble damage issue was not raised in the first appeal. Unlike the duplicative award argument, however, the absence of a treble damage charge drew Gulf's specific objection in the second trial. *See* note 21, *supra*.

31. See p. 7632, *supra*.

We are aware of the fact that there is a division of authority on the wisdom of giving an instruction on treble damages.[32] Indeed, a divergence of opinion developed within a single district.[33] One suggestion to resolve the issue is to inform the jury of the provisions of 15 U.S.C. §15 followed by an instruction to disregard the treble damage provision in their deliberations.[34] Like many such cautionary instructions the primary result of this sugges-

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32. Distinguished authorities that favor informing the jury of the treble damages provision in the antitrust law include 2 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 85.28, at 265 (2d ed. 1970) and their predecessor W. Mathes, Jury Instructions and Forms for Federal Civil Cases, 28 F.R.D. 401, 467 (1961). Cases approving such an instruction are Bordonaro Bros. Theatres v. Paramount Pictures, 203 F.2d 676 (2d Cir. 1953) and Cape Cod Food Products v. National Cranberry Ass'n, 119 F.Supp. 900 (D. Mass. 1954). One commentator has suggested that whether or not the jury is explicitly informed of the provision's existence, it is unreasonable to assume they will not learn of it during the trial. Note, Private Treble Damage Antitrust Suits, *supra* note 14, at 1569, n.20.

Cases disapproving such an instruction include the following: Standard Industries, Inc. v. Mobil Oil Corp., 475 F.2d 220 (10th Cir. 1973) (Error to give such an instruction but harmless); Semke v. Enid Auto Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972); Sablosky v. Paramount Film Distributing Corp., 137 F.Supp. 929, 942 (E.D. Pa. 1955) and Webster Motor Car Co. v. Packard Motor Car Co., 135 F.Supp. 4, 11 (D.D.C. 1955), rev'd on other grounds, 100 U.S. App. D.C. 161, 243 F.2d 418 (1957). *See also* Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959). Although the issue is not explicitly discussed in *Richfield Oil*, a damage instruction without a treble damage provision is labeled as fair, accurate and presenting fully the applicable law. In *Richfield Oil* the verdict was for the plaintiff and the defendant appealed. Pending release of this opinion, another panel of this court reached the same conclusion that we reach. *See* Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974).

33. Prior to Pollock & Riley, Inc. v. Pearl Brewing Co., *supra* note 32, some Judges in the Western District of Texas seemed to favor informing the jury of the treble damage provision while others did not.

34. *See* W. Mathew, *supra* note 33, at 467.

tion may be to emphasize the provision in the jury's mind;[35] thus we find it unsatisfactory to accept this solution without an analysis of the need for the underlying treble damage instruction.

[11] Although the treble damage provision may be partially justifiable on compensatory grounds,[36] its principal purpose is to deter antitrust violations.[37] The prospect of a damage award multiplied three-fold should provide an incentive for private parties to instigate costly and uncertain litigation, thus supplementing Governmental enforcement.[38] If, as everyone seems to assume, mentioning the trebling provisions would lower jury verdicts then the very purposes for which the provision is designed may be frustrated. While we cannot know with certainty what effect such an instruction will have on a particular jury or even juries in general, it is clear that it is the duty of the judge, not the jury, to perform the mandatory trebling. The jury only determines the amount of compensatory damages.

[12] We agree with the Tenth Circuit's statement in Semke v. Enid Auto Dealers Ass'n,[39] that "it serves no

35. Although we are not aware of any empirical data to support this supposition, its validity or invalidity seems capable of resolution by social science research techniques. *See generally* J. Weinstein, Hanz Zeisel's Contributions to the Administration of Justice and the Sociology of Law, 41 U.Chi.L.Rev. 213 (1973).

36. The provision may be necessary because an antitrust violation often involves numerous intangible economic harms which the jury's verdict may not adequately reflect. Note, Private Treble Damage Antitrust Suits, *supra* note 14, at 1566.

37. *See* Semke v. Enid Auto Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972).

38. Kinnear-Weed Corp. v. Humble Oil and Refining Co., 214 F. 2d 891, 893 (5th Cir. 1954).

39. 456 F.2d 1361, 1370 (5th Cir. 1972).

useful function to communicate this information to the jury and it is potentially harmful. . . . ." In *Semke* the district court had given the instruction and this was determined to be error, but harmless error.[40] Thus we conclude that the failure to give an instruction on treble damages is not reversible error.

IV

[13] Next we turn to Gulf's protest of Lehrman's method of proof, particularly his alleged use of "yardstick" evidence. There are two generally recognized methods of proving lost profits: (1) the before and after theory; and (2) the yardstick test. The before and after theory compares the plaintiff's profit record prior to the violation with that subsequent to it. The before and after theory is not easily adaptable to a plaintiff who is driven out of business before he is able to compile an earnings record sufficient to allow estimation of lost profits. Therefore, the yardstick test is sometimes employed. It consists of a study of the profits of business operations that are closely comparable to the plaintiff's. Although allowances can be made for differences between the firms, the business used as a standard must be as nearly identical to the plaintiff's as possible.

Lehrman's method of proof encompassed elements of both the before and after theory and the yardstick theory, but it was not a classic example of either.[41] His expert accountant relying on the history of the station and testimony from witnesses prepared a schedule representing

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40. *Semke* was followed by the Tenth Circuit in Standard Industries, Inc. v. Mobil Oil Corp., 475 F.2d 220, 223 (1973).

41. The two damage theories were used in conjunction in Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946).

sales volumes of fifteen, twenty and thirty thousand gallons per month. In the station's best previous month only fifteen thousand gallons had been sold, but Lehrman believed he could sell more and one of Lehrman's competitors testified that if Lehrman had been able to post competitive prices consistently he could have sold twenty-five thousand gallons per month. For each volume level, profits were computed by using margins of three, four and five cents per gallon, and the margin assumptions were adequately based on the station's past experience. The margins included rent expense under the station's lease agreement with Gulf, but a schedule of other expenses was prepared in order to forecast the potential for net profit. Rather than relying exclusively on Lehrman's past expenses the expert accountant correlated his station expense data with that of three others with which the expert was familiar in order to establish average monthly expense data for service stations. No attempt was made to correlate volume, margin or profit from the other stations; only the expense figures were used. Thus Lehrman's method of proof was not a traditional model of the yardstick theory.[42]

[14-16] Reliance upon past volumes, margins and expenses in order to forecast future profits without emphasis on past profits is not the usual before and after method either. Just because Lehrman's method of proof is specially tailored to fit his case, however, does not render it unacceptable. Indeed, this court has recognized that the task of proving sales never made as a means of calculating damages is a difficult one.[43] Thus, "while the damages may

42. For a good example of the yardstick method *see* Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), cert. denied, 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1960).

43. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 23 (5th Cir. 1973).

not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.[44] The proof may be indirect and it may include estimates based on assumptions, so long as the assumptions rest on adequate data.[45] Lehrman's expert's estimates of lost future profits were based on assumptions regarding volume of gasoline sold, margin and station expense. These assumptions were unquestionably open to challenge and Gulf did challenge them before the jury. Evidentiary support for the assumptions, also exists, and we perceive the resolution of the conflicting claims as the traditional responsibility of the jury.

[17] Notwithstanding the foregoing principles Gulf vigorously protests the admission of Lehrman's evidence labeling it immaterial, irrelevant and prejudicial. First it contends that if future profits are appropriate for consideration, a point it does not concede,[46] it should only be

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44. Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931).

45. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 24 (5th Cir. 1974); Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 902 (5th Cir. 1973); Locklin v. Day-Glo Color Corp., 429 F.2d 873, 879 (7th Cir. 1970), cert. denied, 400 U.S. 1020, 91 S.Ct. 584, 27 L.Ed.2d 632; Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2d Cir. 1962), cert. denied 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85.

46. Gulf does not abandon the position it took in regard to the instruction: future profit is only relevant as a component of going concern value. Gulf continues to maintain that although Lehrman was forced out of a station he had operated for eight years, he suffered no damage because the station had enjoyed only meager success, and after its closure he was freed to pursue other more profitable enterprises. We feel this contention has been adequately answered by our discussion of the instruction on future profits and the previous opinion of this court.

under a before and after model, not a yardstick theory. Since before and after evidence is available and allegedly much more reliable than yardstick evidence Gulf feels it should be the exclusive method of proof. It asserts that Lehrman's station had been in existence long enough to establish a reliable track record from which to determine whether or not his business would have made future net profits absent Gulf's violation of the anti-trust laws. As Gulf is undoubtedly aware this latter assertion is in direct conflict with the conclusion reached on the first appeal.[47] Moreover, our first decision clearly contemplates the use of "yardstick type" evidence.[48] Although our initial opinion is most likely sufficient to rebut Gulf's argument that only before and after evidence is appropriate, the meritless nature of the claim seems self-evident. The assertion is actually a variation on the theme that a firm that failed to prosper under the weight of an antitrust violation is entitled to no damages because there was no substantial profit record. Judge Goldberg's comment in Terrell v. Household Goods Carriers' Bureau[49] is a particularly appropriate rebuttal.

To deny recovery to a businessman who has struggled to establish a business in the face of wrongful conduct

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47. We clearly stated:
"Particularly is the calculation of damages difficult when the future profits of an enterprise as young as Lehrman's must be determined, since there is no reliable track record to look back on. But uncertainty cannot end the efforts of the federal courts to redress the harm caused proprietors by violations of the freedom of the marketplace. The wrongdoer must bear the risk of the uncertainty in measuring the harm he causes." 464 F.2d at 45.

48. 464 F.2d at 48.

49. 494 F.2d 16, n.12 (5th Cir. 1974).

by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy.

[18] Second, Gulf maintains that even if yardstick evidence is generally appropriate in this case, Lehrman's yardstick evidence was improper because the other stations whose expenses were correlated were not nearly identical or even closely comparable to the Lehrman Gulf station. The one station specifically identified by Lehrman's accountant was Bill Brown's Gulf Station in Temple, Texas.[50] Gulf asserts that Temple is a growing community of approximately 30,000 population while Mart, where Lehrman's station was located, has a population of only 2,000. Furthermore, Brown's station is alleged to have sold only two grades of gasoline, regular and premium, while Lehrman sold three. We need not decide whether

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50. In its opening brief Gulf correctly informs us that "Bill Brown's station was not a true 'yardstick'; in that the only figures taken from the station on which to base projected profits were expense figures and *not* the actual gallonage, margin, profit or grades of gasoline sold ratios." (Emphasis in original). Lehrman makes almost identical observations in his brief; the crux of the method being profit comparisons. In its reply brief, however, Gulf apparently disavows its former position and vigorously challenges Lehrman for implying there was no yardstick and for adopting a "no name" theory of damages. Gulf states, "[n]othing could be farther from the truth. Despite Lehrman's protestations to contrary, the record clearly shows that appellee's evidence of projected future net profits was in fact based on a yardstick, Bill Brown's Temple Gulf station." We do not regard the foregoing semantic controversy as the crucial focus in the case. Rather, the inquiry should more appropriately center on whether Lehrman's method of proof, regardless of the label attached is "a just and reasonable estimate of the damage based on relevant data." Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46 (5th Cir. 1972); Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334, 340 (5th Cir. 1970).

Brown's station and Lehrman's are sufficiently similar to allow collation of profits because the data from Brown's station was not used in that manner. Since only Brown's expense data was utilized by Lehrman's expert we cannot perceive how Gulf was injured by the enumerated differences between the two stations.

Although the precise impact of the Brown expense figures is not clear,[51] it may well be that their use arose from an abundance of caution by Lehrman and inured to the benefit of Gulf. Expenses in a growing community of 30,000 population may exceed those in a rural area. In fact, Lehrman asserts and Gulf does not contest the fact that Brown's expenses were about $5,000 a year more than Lehrman's. It is probably safe to assume, therefore, that the Brown data had an inflationary effect on the expense calculations. Similarly, there is no indication that Brown's expenses were significantly lowered by selling two grades of gasoline instead of three.[52]

[19] Third, Gulf complains that "[*a*]*ll the evidence* offered by plaintiff as to the future net profit potential of his business was based on events, facts and business developments which occurred after Lehrman left his service station business." Such evidence is alleged to be inadmissible under Standard Oil Co. of Cal. v. Moore.[53] Initially we note, as Gulf is surely aware, that the jury was fully

51. The expert's testimony is merely to the effect that the expense data was correlated to arrive at average figures.

52. Assuming for the moment that the margin data was compared as well as expense, the number of grades of gasoline sold still seems irrelevant since Gulf's own witness testified that the dealer's margin is the same on all grades.

53. 251 F.2d 188, 221 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958).

informed of the station's history under Lehrman's operation. The real thrust of Gulf's contention is that expense figures drawn from Brown's station were incurred after Lehrman's station had closed. Gulf has not shown that this factor in any way deflated the expense figures and thus raised the projected profits. As we have just noted the opposite result is more probable.[54] Moreover, the station had been in existence for a substantial period of time prior to Brown's operation.

Standard Oil is inapposite here because in that case going concern value not future profits was the measure of damages. The plaintiff, Moore, sought to establish the market value of his goodwill as of August 15, 1952; in that context opinions based on events, facts and business developments occurring subsequent to that date may indeed be irrelevant. But we do not understand that holding to extend to estimates of expenses used to compute future profits.[55] If we did we would expressly disagree.

V

[20, 21] In addition to the contention that Lehrman's evidence was immaterial, irrelevant and prejudicial, it is also claimed that it was unduly speculative and conjectural resulting in an excessive verdict. Much of what has been said in the foregoing paragraphs about Lehrman's method of proof applies with equal force to this additional con-

54. An additional factor present here is that in the economic climate of the past decade it would be most surprising if expenses had decreased with the passage of time.

55. *See* Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 855 (8th Cir.), cert. denied, 343 U.S. 942, 72 S.Ct. 1035, 96 L.Ed. 1348 (1952); Note, Private Treble Damage Antitrust Suits, *supra* note 14, at n.79.

tention. Little purpose would be served in unduly lengthening this opinion by retracing that discussion and responding to each one of Gulf's vitriolic attacks. We have previously outlined how Lehrman projected future earnings by estimating sales volume, dealer margin and expense. Lehrman testified as to his age, health and desire to stay in the business in order to give some indication of the appropriate duration of future profits.[56] The specific shortcoming in the damage evidence identified on the first appeal was corrected by the introduction of evidence concerning Lehrman's earning capacity after he left the station.[57] Rather than characterize Lehrman's evidence as "rank speculation and utter guesswork" we believe it presents a just and reasonable estimate of damages under

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56. The first decision in this case clearly reserved the determination of the duration of future profits to the jury. 464 F.2d at 47. Gulf argues that Lehrman's age, health and personal desires are irrelevant under Standard Oil Co. of California v. Moore, 251 F.2d 188, 219 (9th Cir. 1957). *Standard Oil*, however, only held these factors irrelevant to going concern value not to the duration of future profits.

57. Although the verdict was reversed and remanded for a new trial on damages for failure to consider the mitigating factor of Lehrman's new earnings, the court addressed one of the specific contentions that Gulf raises here.

> Gulf also protests the "speculative" testimony of Ernest Brown [appellant's expert accountant] and urges us to hold this testimony an inadequate basis for assessing Lehrman's damages. But Gulf merely protests application of the familiar rule that a wrongdoer is responsible for uncertainty in calculating the damages proximately caused by his own wrongdoing. On the facts of the present case, there was evidence from which a jury might conclude that Gulf's decision to punish Lehrman by means of its TCA system for failure to abide by Gulf's system of "suggested" prices caused the demise of Lehrman's station. Once it is apparent that damages must be assessed so as to approximate the future profits of a business, a court and jury necessarily enter into the realm of the imprecise and the uncertain.

464 F.2d at 45.

difficult circumstances based on relevant data. As this court stated in Terrell v. Household Goods Carriers' Bureau,[58] "the expert on damages need not be armed on the right hand with a slide rule, on the left hand with a computer. He is allowed some economic imagination so long as it does not become fantasy."

[22] In regard to the alleged excessiveness of the verdict it is likely that Gulf would consider any amount excessive because it contends that the station had no going concern value. This argument requires no further response. Furthermore, we feel that the $40,000 verdict is well within the jury's province[59] even though arguably generous. There is no indication that the jury had any bias or prejudice against Gulf, and it was specifically instructed not to guess or speculate on its deliberations. The jury's verdict has a firm basis in Lehrman's projections of lost profits.[60] Interestingly, the verdicts of the two juries who heard this evidence are reasonably consistent. The first jury returned a verdict for Lehrman of $60,000. Upon retrial the jury was instructed to deduct from its verdict a reasonable amount attributable to Lehrman's earnings after leaving the gas station business. Accordingly, the

58. 494 F.2d 16, 25 (5th Cir. 1974).

59. *See* Lenz v. Southern Pacific Co., 493 F.2d 471, 472 (5th Cir. 1974). The power of an appellate court to review the excessiveness of a verdict is extremely limited. Ross v. Newsome, 289 F.2d 209, 210-211 (5th Cir. 1961). Great caution should be exercised before the appellate courts interfere. St. Louis Southwestern Ry. Co. v. Williams, 397 F.2d 147, 152 (5th Cir. 1968).

60. For example, according to some of the evidence, if Lehrman, a man of thirty-five at the time of the second trial, had operated the station for ten years at a volume of 20,000 gallons per month with a five cent dealer margin, his projected profits were estimated to be $77,480.

second jury returned a verdict of $40,000. From all appearances this jury seems to have weighed the conflicting and complex evidence and performed as fact finders in the best sense of the Anglo-American tradition.

VI

To briefly summarize our holding, we conclude that the instructions in this case do not require another reversal for the following reasons: (1) future profits are an appropriate measure of damages; (2) the instructions did not permit duplicative damages to be awarded; (3) a treble damage instruction was not necessary; (4) although the better practice would be to include a present value instruction, its omission here is not a ground for reversal. Additionally, Lehrman's evidence should not have been excluded on the ground that it was immaterial, irrelevant or prejudicial; nor was it unduly speculative or conjectural. Finally, we have determined that the jury's verdict was not excessive.

Gulf has been adjudicated liable for an antitrust violation. Two juries, a district judge and now six appellate judges have attempted to arrive at a fair damage award within the bounds of sound precedent. Further delay would not serve the cause of justice. Accordingly, the judgment of the district court is affirmed.

Affirmed.

APPENDIX C

Kenneth LEHRMAN, Plaintiff-Appellee

v.

GULF OIL CORPORATION, Defendant-Appellant

No. 29908

United States Court of Appeals

Fifth Circuit

March 15, 1972

As Modified on Denial of Rehearing and Rehearing En Banc June 26, 1972

Action for treble damages, under Sherman Act, brought by plaintiff contending that he had been denied price support when he refused to follow defendant's suggested retail minimum prices on gasoline. The United States District Court for the Western District of Texas, at Waco, Jack Roberts, J., rendered judgment for plaintiff, and defendant appealed. The Court of Appeals, Wisdom, Circuit Judge, held that it was error to fail to instruct jury to make allowance for plaintiff's earnings after being forced out of business by defendant's anti-competitive practice.

Judgment as to liability affirmed; judgment as to amount of damages reversed and cause remanded with directions.

Before WISDOM and COLEMAN, Circuit Judges, and BOYLE,* District Judge.

WISDOM, Circuit Judge:

(The following is the portion of the first Court of Appeals opinion pertaining to the damage issue. That portion of the opinion found at 464 F.2d 26-43 has been deleted.)

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* Hon. Edward J. Boyle, Sr., U. S. District Judge, sitting by designation.

DAMAGES

Also at issue on this appeal is the method used by the trial court in calculating the damages to be awarded Lehrman. The jury was asked to determine, from a general instruction,[14] the quantum of damage sustained by Lehr-

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14. "In determining the damages, if any, that the Plaintiff sustained as a result of a violation, if any, of the Antitrust Law, you are to be governed by the following instructions:

The terms "business" and "property," as used in the Antitrust Laws, signifies that which habitually busies or engages time, attention or labor as a principal serious concern or interest. Our law permits the jury to take into account both any damages which may have been inflicted on existing property and the damages which may have been sustained as a result of being unable to make profit which reasonably could have been anticipated and would have been realized if it were not for the violation of the Antitrust Laws, if any such violation occurred. But you are instructed that it must first be determined that any conspiracy which may or may not have existed was a substantial, identifiable cause of the damage, if any, to the Plaintiff.

In a suit alleging a violation of the Antitrust Laws, in order for the Plaintiff to recover, he must prove that the violation was an identifiable, direct and substantial cause of the damage which he sustained. The Plaintiff then must satisfy you that the damage, if any, which he suffered, was as a fact attributable to the conspiracy, if any there existed. But while the Plaintiff has the burden of showing that any damage which he may have sustained was the result of the violation, he would not have to prove with exact mechanical accuracy the extent of the damages; however, the damages alleged must be established by a preponderance of the evidence as a direct and identifiable result of a violation of the Antitrust Laws. In other words, the Plaintiff must satisfy you that the damages, if any, would not have occurred but for the violation, if any.

In this case you are instructed that you cannot award any damages, if any, that may have occurred prior to March 1, 1964.

In considering the element of future profits in determining what damages, if any, were sustained by Plaintiff, you are instructed that if because of a conspiracy the Plaintiff was unable to earn net profits which would in reasonable probability have accrued to him but for the conspiracy, then, Plaintiff was in fact damaged. Future profits

man as a result of the anticompetitive practices of Gulf. The jury was authorized to find that Lehrman was damaged by the amount of any future net profits which did not accrue to him but which would have accrued to him but which would have accrued to him in reasonable probability but for the conspiracy of which Lehrman complained. The trial court cautioned the jury not to base any calculation of future profits upon speculation or "sheer guesswork", but only upon "a just and reasonable estimate of damage based on the relevant evidence." The relevant evidence, according to the trial judge's charge, included "the past history and net profits of the business, the experience and competence of the plaintiff in the filling station business, the competition which the plaintiff would have had in and around Mart, Texas, and the general market conditions in that area." The jury returned a verdict of $60,000 in Lehrman's favor, and when asked, the foreman explained that the $60,000 sum was intended to cover a ten-year period. The district court set aside this verdict and entered judgment for Lehrman in the amount of $21,000 trebled ($63,000) plus costs and interest. In so doing, the court explained that it was reducing Lehrman's damages from a period of ten years' duration to one of only three and a half years—the period from 1964 to

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mean net profits, and are determined by subtracting the cost and expense of a business from its gross revenue.

You are instructed that you may consider in determining whether or not any part of Plaintiff's damages constitute future net profits the past history and net profits of the business, the experience and competence of the Plaintiff in the filling station business, the competition which the Plaintiff would have had in and around Mart, Texas, and the general market conditions in that area. You may not base any findings of damages on sheer guesswork, but must make a just and reasonable estimate of damage based on the relevant evidence."

1967 during which Lehrman operated his Gulf station as a lessee.[15]

Gulf raises several objections to the damage calculation. First, it objects to the use of future profits as a measure of Lehrman's damages because, it contends that allowing Lehrman to recover for future profits would enable the proprietor who has been the victim of a single anti-competitive practice to walk away from his business and collect damages for future profits despite the possibility that the business might still be operated successfully. Gulf stresses that the cases which have allowed future profits as a measure of antitrust damages have been cases involving refusals to deal, or cancellation of leases, both of which practices rendered it impossible for the proprietor who had been damaged to continue in business.[16]

[21] We do not accept Gulf's restrictive application of the principle of future profits as antitrust damages. When a practice condemned by the Sherman Act puts a small operator out of business, we do not think it matters whether the antitrust violator directly closes down the

15. THE COURT: The Judgment is ordered in the amount of—ordered for the Plaintiff in the amount of $21,000.00. The jury, you will recall, stated in their findings that they based the computation of the damages under the charge at a rate of $6,000.00 per year. The evidence showed that the actual tenure—and if I am wrong about this, you gentlemen correct me—the actual time that the Defendant—that the Plaintiff spent in the station as lessee-dealer, or whatever he is, was three and a half years; is that correct, three and a half years?

MR. PRICE: That is as I recall it, Your Honor.

THE COURT: All right. That is why the judgment is entered in the amount of $21,000.00. Motion for modification or for judgment n. o. v., that is not a correct motion, either, that is, in response to the motion n. o. v., but the damages are modified to that extent, $21,000.00.

16. E.g., Lessig v. Tidewater Oil Co., 9 Cir. 1964, 327 F.2d 459, 465; Osborn v. Sinclair Refining Co., 4 Cir. 1963, 324 F.2d 566.

small proprietor or whether he takes anti-competitive steps which foreseeably will result in the proprietor's demise if carried on for a sufficient amount of time. Nor are we persuaded by Gulf's prediction that the awarding of future profits in this context licenses the victims of single anti-trust violations to abandon their still-thriving businesses in order to cash in on the bonanza of a future profits judgment. The facts of the present case give no hint that Lehrman abandoned a successful gas station in the hopes of securing a large judgment in his favor. After 1965, Lehrman struggled along until finally it was clear that the station was not worth his while.[17]

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17. The record reveals the following key statistics for Lehrman's business.

GASOLINE	GALLONAGE	
1960	102,219	
1961	100,524	
1962	106,444	
1963	107,404	
1964	128,750	
1965	103,107	
1966	81,417	
1967*	62,727	*(nine and one-half months)
TOTAL SALES	(rounded to next dollar)	
1960	$41,344	
1961	39,103	
1962	39,345	
1963	43,831	
1964	48,985	
1965	46,338	
1966	38,301	
1967*	28,480	*(nine and one-half months)
NET PROFIT	[or (LOSS)]	
1960	($1015)	
1961	690	
1962	(2971)	
1963	(78)	
1964	1376	
1965	1105	
1966	1295	
1967*	(2322)	*(nine and one-half months)

[22, 23] Gulf also protests the "speculative" testimony of Ernest Brown and urges us to hold this testimony an inadequate basis for assessing Lehrman's damages. But Gulf merely protests application of the familiar rule that a wrongdoer is responsible for uncertainty in calculating the damages proximately caused by his own wrongdoing. On the facts of the present case, there was evidence from which a jury might conclude that Gulf's decision to punish Lehrman by means of its TCA system for his failure to abide by Gulf's system of "suggested" prices caused the demise of Lehrman's station. Once it is apparent that damages must be assessed so as to approximate the future profits of a business, a court and jury necessarily enter into the realm of the imprecise and the uncertain. Particularly is the calculation of damages difficult when the future profits of an enterprise as young as Lehrman's must be determined, since there is no reliable track record to look back on. But uncertainty cannot end the efforts of the federal courts to redress the harm caused proprietors by violations of the freedom of the marketplace. The wrongdoer must bear the risk of the uncertainty in measuring the harm he causes. Bigelow v. RKO Radio Pictures, Inc., 1946, 327 U.S. 251, 265, 66 S.Ct. 574, 90 L.Ed. 652; Story Parchment Co. v. Patterson Parchment Paper Co., 1931, 282 U.S. 555, 566, 51 S.Ct. 248, 75 L.Ed. 544. The Supreme Court has recently reminded us that "[t]rial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible for the kind of concrete, detailed proof of injury which is available in other contexts." Zenith Radio Corp. v. Hazeltine Research,

Inc., 1969, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 148.

In characteristically forthright language, Mr. Justice Black addressed himself to the very problem before us when the *Simpson* case found its way back to the Supreme Court, after remand, on the issue of damages. We quote Mr. Justice Black's explication of the *Bigelow* rule:

> Antitrust damages such as those involved here are bound to be "speculative" and "conjectural" to some extent. When a person wrongfully takes government bonds worth $10,000 on the market, the damages can be precisely measured. But when as here a young man's business is wiped out root and branch by a wrongdoer, the measurement of the victim's damages is not so simple a matter. This is true because no one can infallibly predict how long that business would have continued to grow and flourish or precisely how much the business would have been worth to him in 25 years. But certainly a fair and just legal system is not required by difficulties of proof to throw up its hands in despair and leave the sufferer's damage to be borne by him while the person who did the wrong goes scot free. This Court has refused under such circumstances to hold that our system of justice is so helpless to do justice. In this very antitrust field our Court has specifically and pointedly refused to permit antitrust violators to escape liability for their wrongs on the argument that damages must not be awarded because they are uncertain and speculative.

Simpson v. Union Oil Co., 1969, 396 U.S. 13, 16, 90 S.Ct. 30, 32, 24 L.Ed.2d 13, 16 (Black, J., concurring and dissenting).

[24, 25] In short, the law is clear: the courts are to take a charitable view of the difficulties of proving dam-

ages in a case when a treble-damage plaintiff must try to prove what would have accrued to him in the absence of the defendant's anticompetitive practice. Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 5 Cir. 1967, 383 F.2d 97, 106. But this tolerant view is limited by our responsibility not to allow damages to be determined by "guess-work" or "speculation"; we must at least insist upon "a just and reasonable estimate of the damage based on relevant data." *Bigelow, supra,* at 327 U.S. 264, 66 S.Ct. at 580, 90 L.Ed. 652; Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1970, 431 F.2d 334, 338. We must continue to be sure that damage awards of the kind involved in the present case meet the basic requirements of coherency and consistency which any lawyer expects of an ordinary recovery on, say, contractual expectations, perhaps the most analogous problem of damage calculation to the one before us today. We are unable to find the requisite degree of coherence in the damage award before us, and we remand the cause for further proceedings restricted to the question of the proper measure of Lehrman's damages.

To begin with, so far as we have been able to discern from the record, there was no allowance in the original jury verdict for mitigation of Lehrman's damages by the amount of his earnings in his current line of work. The income tax returns in the record indicate that Lehrman's salary expenses of running his gas station was not incurred as salary payments to himself; consequently, there seems to be no possibility that Lehrman's earnings above the net profits of the station (in the form of a salary paid to him by the station) might have been properly included in the measure of his damages. Rather, it appears that when Lehrman's gas business folded, he was freed for other pay-

ing forms of work, and that Lehrman could be damaged only by the excess of any lost future net profits over his actual earnings in alternative employment. Thus, from the outset, the $60,000 for ten years, or $6000 per year, figure which underlay the jury verdict was based upon too broad a conception of the damages caused Lehrman by Gulf's punitive withdrawal of TCAs.

Failure to instruct the jury to deduct a reasonable amount attributable to Lehrman's earnings after leaving the gas station business was the only defect in the lower court's charge to the jury. In light of this error in the underlying damage calculation of $6000 per year, the appropriateness of the district court's "remittitur" is not strictly at stake on this appeal. But we have several difficulties with the court's remittitur, and think it best to elaborate those difficulties at this point rather than to await the possibility of further confusion, error, and delay.

[26] It is not clear whether the trial court's decision to enter judgment for Lehrman in the amended amount of $6,000 times three and a-half years, in lieu of the jury determination of $6,000 times ten years, (both sum trebled), constituted a determination of law or a determination of fact. If the district court meant to hold that the duration of the plaintiff's harm was, as a matter of fact, only three and a-half years, it was improper for the court to allow the jury to make a factual determination of ten years and then to overrule the jury's finding of fact by entering judgment contrary to it. The district court gave the plaintiff no chance to decide whether he wished to remit a portion of his damages or face the possibility of a new trial. Instead, when there was factual uncertainty over the amount and duration of plaintiff's harm, the court simply took a different view from the jury's and entered

judgment accordingly. In so doing, if that is what the court was doing, the trial court violated the command of the Seventh Amendment, which prohibits re-examination of the facts found by a jury. Prochot v. Drew, 7 Cir. 1960, 283 F.2d 904, 905; see 6A Moore's Federal Practice #59.05 [3] n. 36.

[27, 28] On the other hand, if the district court's "remittitur" was truly intended as a ruling that, as a matter of law, damages incurred by reason of an unlawful conspiracy to fix resale prices must be limited to the actual years of business operation, that proposition of law cannot stand. In cases involving refusal to deal, it is clear that damages cannot be limited to losses sustained before the plaintiff is unlawfully cut off from his supplier. E.g., Osborn v. Sinclair Refining Co., 4 Cir. 1963, 324 F.2d 566. Whether a man's business is intentionally and immediately snuffed out, as by a refusal to deal, or whether it is slowly but surely forced under by anti-competitive wholesale pricing, the proper standard of measuring damages when a business is forced under by anti-competitive activity is the same: what financial advantage would the plaintiff have gained but for the actions of the defendant? The duration of the period during which the plaintiff might be expected to profit will vary from case to case; it is susceptible of no precise formulation, and must be left to the processes of the jury informed by the presentation of conflicting evidence. Of course, the court might properly instruct the jury that it may consider as one factor in its deliberations the length of time which the plaintiff had been in business as of the time of the defendant's anti-competitive actions; but the youth of a business, like the precise manner of its doing-in, will never alone be enough to justify severe restrictions upon the duration of

damages. The court may condition a new trial on remittitur if it feels strongly that the jury verdict is excessive. But it is arbitrary and improper to limit damages as a matter of law to the precise period of the plaintiff's business operations if the reason for that limitation is either the means used to drive the plaintiff out of business or the relatively short history of his business before its demise.

We remand the cause to the district court for a new trial only on the issue of damages. At the new trial, Lehrman may introduce additional evidence to provide the jury with a better "yardstick" to measure Lehrman's losses. There may be additional evidence to clarify the possible length of Lehrman's future tenure in the station and therefore the appropriate duration of future profits. Additional evidence will likely be necessary to provide some measure of the deduction from Lehrman's damages which must be attributed to the present and future earning capacity he now has which he would not have enjoyed had he continued to look chiefly to the station for his income and to devote most of his time to its operation.

The judgment of the district court as to Gulf's liability is affirmed; but that court's judgment as to the amount of the plaintiff's damages is reversed and the cause remanded for further proceedings consistent with this opinion.

RESPONDENT'S BRIEF

JAN 16

No. 74-765

In the

Supreme Court of the United States

October Term 1974

KENNETH LEHRMAN,

Respondent,

v.

GULF OIL CORPORATION,

Petitioner.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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To The Honorable Supreme Court of the United States:

PRELIMINARY STATEMENT

The factual history of the case is well stated in the opinion of this Court rendered March 15, 1972.

The first trial resulted in a decree finding Gulf guilty of antitrust violations and assessing damages. The Fifth Circuit Court affirmed on the issue of liability, and the fact of damages, stating " * * * (Lehrman) could not compete with the Waco stations and still pay the wholesale prices demanded of him by Gulf. In 1967, upon sustaining a sizeable net loss, Lehrman went out of business."[1] The Court reversed for retrial on the issue of the "quantum" of damage sustained by Lehrman as a result of the anti-competitive practices of Gulf.

[1] See concluding portion of the first section of the Court's opinion; this is a refutation of the allegation at page 4 of the Petition that Lehrman "abandoned" the station.

To a large degree, the opinion of March 15, 1972, (issued in the first appeal) controls the resolution of present issues. The basis for the remand on amount of damages was that "* * * there was no allowance in the original jury verdict for mitigation of Lehrman's damages by the amount of his earnings in his current line of work." It was noted:

> "Failure to instruct the jury to deduct a reasonable amount attributable to Lehrman's earnings after leaving the gas station business *was the only defect* in the lower court's charge to the jury." (Emphasis supplied)

The Court made no other specific criticism of the evidence relating to damages, but did, in the concluding portion of the opinion, offer these observations:

> "At the new trial, Lehrman may introduce additional evidence to provide the jury with a better 'yardstick' to measure Lehrman's losses. There may be additional evidence to clarify the possible length of Lehrman's future tenure in the station, and therefore the appropriate duration of future profits. Additional evidence will likely be necessary to provide some measure of the deduction from Lehrman's damages which must be attributed to the present and future earning capacity he now has which he would not have enjoyed had he continued to look chiefly to the station for his income and to devote most of his time to its operation."

On retrial, the "only defect" in the trial court's charge was corrected by including an instruction to the jury to deduct "such amount of money as he [Lehrman] was reasonably able to earn after the closing of his station from alternative sources of income as a result of being freed to pursue such alternative sources of income by virtue of no longer being required to devote labor and time to operation of the station."[2] The Plaintiff introduced evidence regarding (1) the

[2] No objection was made to this portion of the charge, and no contention regarding it is made in the Petition for Certiorari.

possible length of Lehrman's future tenure in the station and (2) the deductions from Lehrman's damages which must be attributed to the present and future earning capacity which he would not have enjoyed had he looked chiefly to the station for his income. Furthermore, Plaintiff introduced evidence regarding the amount ordinarily paid for services of a station manager so that the picture of profits from the operation of the station would not be distorted by failing to take into account all expense items. In this regard the Court instructed the jury: "that in considering the lost profits accrued as of the time of closing the station, if any, you must offset all expenses, including a reasonable amount for Plaintiff's services as manager of the station."

Thus, the evidence supplied the deficiencies noted in the earlier opinion. Tested against the criteria of the opinion and the law of damages in antitrust cases, the points raised in this petition are revealed to be totally without merit, In fact, certain of the points were not even properly preserved for review on appeal. The ensuing discussion illustrates both these propositions.

REASONS FOR REFUSING THE WRIT

1. *Appellant Failed to Object to the Claimed Defects in the Court's Charge*

At the conclusion of the reading of the Court's charge to the jury (a copy of which had previously been delivered to counsel), Petitioner made certain objections. App. Vol. I. 42-43. There was no reference whatsoever to the claimed defects asserted in this petition.

Rule 51, F. R. C. P. provides, in pertinent part:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Moore's Federal Practice, Vol. 5A, Sec. 51.04, p. 2507, points out that in the absence of objection, the Court's instructions to the jury are not reviewable. It is noted that an appellate court may in its discretion consider grounds of error in spite of failure to object where it is apparent on the face of the record that a miscarriage of justice may occur; in other words, the court may review so-called "plain error". Obviously, this is not such a case. Even if the strained construction of the Court's charge advocated by Petitioner be adopted, the instructions assailed are innocuous when considered in light of the charge as a whole, the evidence, and the arguments to the jury. This is particularly true when consideration is given to Rule 61, F. R. C. P., the so-called "harmless error" rule, which is applicable to alleged errors in the Court's charge. See: *Moore's* Vol. 7, Sec. 61.09, p. 61-33.

Accordingly, it is clear that even if the Court's charge contained an erroneous instruction, the error has not been preserved for review by this Court. The following discussion demonstrates that no such error exists.

2. *The Court's Charge Did Not Allow the Jury to Award Duplicative Damages.*

The primary point raised by the Petitioner is that the charge contained an erroneous instruction which allowed the jury to award "duplicative" damages. The exact wording of the instruction under attack is as follows: (App. Vol. I, p. 35:)

> "Our law permits the jury to take into account both any damages which may have been inflicted on existing property and the damages which may have been sustained as a result of being unable to make profit which may reasonably could (sic.) have been anticipated and would have been realized if it were not for the violation of the antitrust laws."

Petitioner fails to note that preceding this language were these instructions (App. Vol. I p. 34-35):

> "The Law provides that damages may be awarded to any person whose business or property is injured as a result of a violation of the antitrust laws. The term 'business or property' is used in the ordinary sense and denotes a commercial venture or enterprise. *You may award damages only on the basis of proven injury to Plaintiff's business or property.*" (Emphasis supplied)

Obviously, these instructions eliminate any possible invitation to award duplicate damages.

Exactly the same instructions were contained in the Court's charge to the jury in the first trial. (See p. 28, slip opinion) Petitioner attacked the charge on damages, and the testimony on which it was based, in the first appeal, but the Fifth Circuit held:

> "Failure to instruct the jury to deduct a reasonable amount attributable to Lehrman's earnings after leaving the gas station business *was the only defect in the lower court's charge to the jury.*" (Emphasis supplied)

The instructions assailed are merely declarative of the applicable law. Title 15, U.S.C.A. Sec. 15, provides that any person injured in "his business or property" by reason of anything forbidden in the antitrust laws may bring suit for recovery. The thrust of Petitioner's contention is to interpret the phrase "business or property" as being mutually exclusive. The law is clearly to the contrary. In the case of the *State of Minnesota v. United States Steel Corporation*, 299 F. Supp. 569 (1969) U.S.D.C., D. Minn. the Court stated at page 604:

> "* * * a party suing for treble damages is entitled generally to recover for (1) loss of profits, (2) decrease in the value of investment, *and* (3) increased cost of business actually transacted. *Atlantic City Electric*

Co. v. General Electric Co., 226 F. Supp. 59, 61 (S.D.N.Y. 1964)." (Emphasis supplied)

Atlantic City Electric Co. v. General Electric Co., 226 F. Supp. 59 (S.D.N.Y. 1964) puts to rest any notion that a plaintiff is not entiled to recover both lost profits and injury to property. (See page 61 of the opinion).

Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 900, is directly on point and could have served as a model for the instruction in question. It holds that in determining damages in an antitrust action, the jury may take into account both the damages which were inflicted on existing property and the damages which were sustained by being unable to make profits which reasonably could be anticipated, and which would have been realized by Plaintiff had it not been for the wrongdoing of the Defendant.

Flintkote Co. v. Lysfjord, 246 F. 2d 368, cert. den. 78 S. Ct. 54, 355 U.S. 835, 2 L. Ed. 2d 46, is even more explicit. It holds that in an antitrust action out-of-pocket expenses incurred in establishing business in another city, out-of-pocket expenses resulting from increased cost of product caused by Plaintiff's inability to purchase supplies, and loss of profits from inability to acquire product on a direct basis were all recoverable in the same action, *and not all or any two were mutually exclusive.* In this connection, see also *Clapper v. Original Tractor Cab Company*, 165 F. Supp., affirmed in part and reversed in part, 270 F. 2d 616, cert. den. 361 U.S. 967.

It is clear, therefore, that the Trial Court's general instructions to the jury are correct, and in fact taken directly from the text of settled authorities. The basic misconception in the Petition is the equation of the term "existing property" as used in the trial court's charge, and the term "market value". Since the term "market value" is nowhere mentioned in the charge, Petitioner translates "existing property" into

"market value" in order to argue that the charge allows duplication of damages. The terms obviously do not mean the same thing. Petitioner's argument fails for lack of a valid premise, and authorities indicating that a treble damage Plaintiff may not recover for decrease in market value *and* loss of future profits, as separate items, are inapplicable.

3. *The Court Did not Err in Refusing to Instruct the Jury That Any Damages Found Would be Trebled and That Attorney's Fees Would be Awarded.*

The Fifth Circuit has now determined that it is better practice to refuse the treble damage instruction. However, to date, no reversible error has been found in a trial court's instruction that any awarded damages will be trebled or that attorneys fees may also be recovered, nor for the trial court's refusal to do so. It has been argued that "it is unreasonable to assume that they [the jury] will not learn of it anyway during the trial." 80 Harvard Law Review 1566, 1569 note 20 (1967). Submission has been favored by Judge Wyzanski and has received the imprimatur of Devitt and Blackmar, *Federal Jury Practice and Instructions*, Sec. 85.28 (1970). But in *Webster Motor Car Company v. Packard Motor Car Company*, 135 F. Supp. 4 (D.D.C. 1955) Judge Holtzoff rejected such instruction stating that there was no reason for informing the jury that whatever damages they would allow would be trebled, *because this is a matter solely for the Court. Sablosky v. Paramount Film Distributing Corporation*, 137 F. Supp. 929 (E.D. Pa. 1955) is to the same effect.

It is only logical that an instruction to the jury informing them that any amount awarded for damages is to be multiplied by three would tend to reduce the jury's award, make it more difficult for a plaintiff to receive actual damages, and thus defeat the purpose of the trebling provision. This has been recognized by the Fifth Circuit in the present case and in *Pollock & Riley v. Pearl Brewing Co.*, 498 F. 2d 1240

(Fifth Circuit 1974). It has also been recognized in the 10th Circuit. See: *Semke v. Enid Auto Dealers Ass'n*, 456 F. 2d 1361, 1370 (10th Cir. 1972). These decisions constitute the "weight of better reasoned authority" and should be followed.

4. *The Evidence Clearly Supports the Jury's Assessment of Damage.*

Respondent introduced all facts reasonably available for the jury to take into account in making its damage determination. Records were introduced which showed the actual expenses of and income from the station for the entire period that it was in existence. See P. Ex's 2-12, 13-15, 16-25, 35 and 46A-F. Mr. Lehrman testified that if he had been able to post competitive prices he easily could have sold at least 20,000 gallons of gasoline per month. (App. Vol. I, p. 87-88; no objection was made to this testimony). Mr. Durst, the Cape station representative, stated that, given competitive prices, Lehrman could have sold as high as 30,000 gallons per month. App. Vol. I, p. 222. This testimony was corroborated by the witness Jones, who detailed actual experience with stations that he owned in Mart and at Harrison Switch, which latter station sold at "Waco prices". The Harrison Switch station sold an average of more than 300,000 gallons per month, about twice the amount of gasoline sold by the Mart station, during the period that Lehrman was in operation. Later, after prices in Mart became more competitive, (and Lehrman was out of business) the volume of the Mart station increased to 10,000 gallons more per month than the Harrison Switch station.

It was undisputed that, as per Gulf's "TCA" practice, the minimum gross margin of profit on every gallon of gasoline was 4.5¢ per gallon and the maximum 5.8¢ per gallon depending on amount of "price support" in effect. App. Vol. I, p. 82. By far the greatest percentage of the gasoline sold by Lehrman was at the top or maximum gross margin. App. 496-497. With the exception of the year 1964, very little "price support" was in effect. App. Vol. I, p. 496-497. Deducted from the

gross margin is the rent charged to the station operator which, in Lehrman's case, was one and one-quarter cent per gallon sold at the station, up to a maximum of $150.00 per month. This means that the net margin, i.e. after payment of rent, ranged from 3.25¢ per gallon to 4.55¢ per gallon.[3] This applied only on Gulftane. Lehrman *always* received the top margin on "regular" and "No-nox". He sold approximately 57,000 gallons of Gulftane in 1964, but there is no record available to determine how much of it was sold to farmers or how much of it was sold at less than the dealers margin corresponding to the price support in effect. However, Mr. Lehrman testified as to the amount of gasoline sold at the different dealer margins in effect for a period of time prior to 1964, P. Ex. 53, on which he realized a net (after rent) margin of approximately .4¢. Records to give a complete picture for all years of operation were not available to Mr. Lehrman (although Gulf undoubtedly had them). App. Vol. I, p. 496-500. Mr. Lehrman did, however, testify that in all the years of operation the majority of the gasoline that he sold was with the maximum dealer margin in effect, and that the maximum dealer margin was in effect at *all* times after the year 1964. App. 495-500. The testimony, therefore, indicates that the average net dealer margin, after payment of rent, on all gasoline sold at Lehrman's station was at least four cents per gallon.

Based on this evidence an income analysis was made by Mr. Ernest L. Brown. Mr. Brown was furnished with Lehrman's tax returns for 1959 through 1967. App. Vol. I, p. 233-236. His analysis took into account standard expense items incurred by a "model" Gulf station, which were cor-

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[3] However, since the maximum rent was $150.00 per month, the rent per gallon would decrease when the volume exceeded 12,000 gallons per month. Thus, when sales equalled 15,000 gallons per month, the rent was only 1¢ per gallon; at 20,000 gallons per month the rent was .75¢ per gallon; and at 30,000 gallons per month the rent became .5¢ per gallon. This is important when considering Mr. Brown's income and profit analysis, for it increases the "net" (after rent) dealer margin (as established by the Gulf T.C.A. schedule) from a minimum range of 3.5¢ to 4.8¢, to a maximum range of .4¢ to 5.3¢.

related to Lehrman's actual expenses and to expenses incurred by other stations for which Mr. Brown kept records. App. Vol. I, p. 238-239. Income items, other than gasoline sales income, were similarly correlated. App. Vol. I, p. 238-239. Mr. Brown's analysis assumed gasoline sales of 15,000, 20,000 and 30,000 gallons per month, at dealer margins of three-, four-, and five-cents per gallon.[4] *No other assumptions were made.*

Projection periods were 10 and 20 years, corresponding to claims for future damages. Separately analyzed was a two and a half years term, corresponding to the "past damage" period, i.e., from the cutoff date contained in the Court's charge through the cessation of business by Lehrman. P. Ex. 47B, App. Vol. II, p. 88. After deducting for the salary of a station manager, and based on margins which take into account payment of rent, the projection for sales of 15,000 gallons per month at .3¢ margin shows a small net loss ($36.00 per month); see P. Ex. 47A. However, every other projection shows a clear profit, and most show profits over the projection periods far exceeding the amount of damage awarded — e.g., profit on 20,000 gallons per month for 10 years would be $53,480.00. (See P. Ex. 47A) Furthermore, it must be remembered that the expenses used to make the analysis were higher than those actually incurred by Mr. Lehrman, (this was done in order to insure a fair estimate of net profits and allow for increased expenses of operation) by about $5,000 per year. App. Vol. I, p. 391-416. Considering Mr. Lehrman's actual expenses, a substantial net profit at the lowest projected level of sales of 15,000 gallons per month at a .3¢ margin. This profit is further increased when it is considered that, since rent was a maximum of $150.00 per month, the margin, after rent, would be a minimum of 3.5¢ per gallon on sales of 15,000 gallons per month.

In addition, Mr. Lehrman testified that he received far less for the inventory and equipment when he was required

[4] The projection exhibits refer to retail sales prices of two grades of gasoline, but Mr. Brown testified that these were simply retail prices corresponding to the three-, four-, and five-cent margins, which margins are the same regardless of grade.

to sell than he had originally paid for comparable inventory and the same equipment, to which he had added approximately $2,000.00 worth of additional equipment. The equipment had been depreciated for income tax purposes, but Mr. Lehrman said that it would still "do the same job", and, even at the depreciated figures, there was a loss in value (though admittedly small) of the equipment and inventory. App. Vol. I, p. 95-97; 124.

Thus, the evidence clearly demonstrates loss of "property" and "business" for which recovery may be made. No attempt was made to evaluate so-called "market-value" or "good will" value by taking into account, in "lump" fashion, the value of property and business intangibles (including profits). Mr. Lehrman did not sell his "business" to Mr. Lawrence, and could not have done so, since Gulf retained the right to designate the station's dealer. As a practical matter, because of the inherent nature of the arrangement between Gulf and the dealer (which type of arrangement has been characterized as "economic serfdom",) the dealer is not in position to acquire "market" or "good will" value. This is made abundantly clear by the cross-examination of the Gulf witnesses *Lander*, App. 306 et. seq., and *Kiesling*, app. 336, et. seq.

The matter of the so-called "market value" of the station was thoroughly aired during trial. The jury was instructed by argument from Respondent's counsel that there was no practical way to evaluate market value, and therefore damages were to be measured by what would be, in effect, only one constituent element of market value, i.e., the lost profits. (There was no appreciable effort to argue the other constituent element in evidence, i.e., loss inflicted upon existing property). Likewise, the point was heavily argued by Gulf's attorney, who told the jury that the only proper measure of damages was loss of market value, and that there was no such loss.

Accordingly, it is clear that the damage award is well supported by the evidence, and the contention that the Court's charge led to duplication of damages is without merit.

5. *There was no Improper "Yardstick" Evidence.*

Petitioner's assault upon the evidence embodies the contention that the Trial Court allowed the Respondent to introduce evidence of a confused "yardstick" theory, in which the "model" station was not "closely comparable" or "nearly identical" to Respondent's station. Because of this, Petitioner contends, the Court erred in allowing introduction of evidence relating to the "yardstick", which was irrelevant and immaterial.

To fortify the argument, the Petitioner assails the testimony of Mr. Brown that expenses included in his projection were based upon those of a Gulf station in Temple, Texas. Petitioner ignores the testimony that the expenses in the projection were not "exactly" those of the Temple station, but were correlated to expenses of Lehrman's station as well as other stations. See: App. Vol. I, p. 237. These expense items were used in order that a fair estimate of the cost of operating over the period of projection could be ascertained. Income was determined by gasoline sales of certain volumes (for which there was evidentiary support) at fixed margins (which correlated to the margins established by Gulf's TCA system, after deduction of rent) and by oil and TBA sales and mechanic work correlated to the volume of gasoline sold (testimony as to ordinary mark-up on oil and TBA, and the correlation between gasoline sales and oil and TBA sales and mechanic was introduced through Lehrman and Brown without objection.)

Petitioner does not make a specific attack upon the figures employed, but simply challenges the use of figures in any way relating to a station other than Lehrman's. However, it appears that the Petitioner has waived any possible error by failure to object to the evidence when it was offered during the trial. Mr. Brown's analysis and projections, based upon the figures the use of which is now challenged, are embodied in Exhibits No. 36, 47-A, and 47-B. The testimony qualifying these exhibits is reproduced in the margin at pgs. 23-28 of Appellees brief, and at App. p. 236, line 12,

p. 242, line 23. At the conclusion of the qualification and upon offer of the Exhibits, Mr. Bailey, Attorney for the Petitioner stated "No objection". App. Vol. I, p. 242.

This should dispose of the point. However, a complete answer to Petitioner's argument will be made to demonstrate that there was, in fact, no error.

Respondent did not employ a "yardstick" theory of damages. This theory is explained in Vol. 80 Harvard Law Review, p. 1566, at page 1575:

> "A second theory of damages, the "yardstick" test, which consists of studies of the profits of firms closely comparable to Plaintiff's, is necessary because the "before and after" theory is not available to a plaintiff who is driven out of business by an antitrust violation before he is able to compile an earnings record sufficient to allow estimation of lost profits. *But the two theories are not mutually exclusive and have been used together* . . . [citing *Bigelow v. R.K.O. Radio Pictures, Inc.*, 322 U.S. 251, (1946). The fundamental limitation on the yardstick test is that the business used as a standard must be as nearly identical to the plaintiff as possible, but unharmed by the violation, so that it can be concluded that plaintiff's profit record would have paralleled the other firms had the violation not intervened . . . (Citing *William Goldman Theaters, Inc. v. Loews, Inc.*, 69 F. Supp. 103) *Allowances can be made for differences between the firms* . . . [Citing *Richfield Oil Corporation v. Karseal Corporation*, 271 F. 2d 709, cert. den., which is referred to as one of the best examples of use of the yardstick test]. Sometimes the only available yardstick is the Defendant's own business. Here the problem of estimating compensatory damages is aggravated by the need to isolate the amount by which the Defendant's profits were increased over a competitive level by his violation." (Emphasis supplied)

Obviously, therefore, there was no "yardstick" theory employed because there is no reference in the testimony

to "profit" of the so-called "model" station. *There was no effort to compare profits,* which is the crux of the "yardstick" method. Respondent simply went to the best available sources, *including his own records,* to authoritatively document and establish the types and amounts of expenses ordinarily incurred in service station operations in order to fairly estimate net profit resulting from different levels of gasoline sales.

Even if this could be considered application of the "yardstick" theory, it is clear from the above quotation that there is nothing improper in the evidence. The "yardstick" and the actual figures from Lehrman's operation are in evidence, and "yardstick" is not exclusive of other methods of measuring lost profits. Furthermore, allowance can be made for the differences between yardstick firms, and certainly the Petitioner went to lengths to establish the differences in cross-examination of Mr. Brown, independent testimony adduced before the jury, and jury argument.

In fact, the same differences urged upon the jury are the ones relied upon by Gulf in advancing the contention that the evidence was inadmissible. Petitioner says that Temple, Texas, is larger than Mart, Texas — a point not in dispute. But the only pertinent factor is whether the evidence shows that Lehrman's station, in the absence of the antitrust violation, could have sold gasoline at any of the levels comprehended by the projection (i.e. from 15,000-30,000 gallons a month). There is evidence that he could (and did, i.e., he sold 15,000 gallons one month when he had competitive prices).

The authorities cited by Petitioner dealing with the "yardstick" theory have no application. The Respondent made no attempt to analyze profits from the Temple station or to employ a "yardstick" to measure loss. No case cited by Petitioner holds that the type of evidence here involved is inadmissible, or that its introduction requires reversal.

It is clear that this point is wholly without merit.

6. *There Was No Error in Allowing Lehrman to Testify to Age, Health, and Desire to Stay in Business.*

Petitioner argues that allowing testimony as to health, age, and desire to stay in business, was improper. Contrary to the statement that the Fifth Circuit recognized this to be in direct conflict with *Standard Oil Co. v. Moore*, 251 F. 2d 188, (9th Cir. 1957) the lower court correctly disposed of this contention in the following passage (footnote 56):

> "The first decision in this case clearly reserved the determination of the duration of future profits to the jury. 464 F. 2d at 47. Gulf argues that Lehrman's age, health and personal desires are irrelevant under *Standard Oil of California v. Moore*, 251 F. 2d 188, 219 (9th Cir. 1957). *Standard Oil*, however, only held these factors irrelevant to going concern value not to the duration of future profits."

This point is without merit.

7. *The Court Did Not Err in Permitting the Introduction of Evidence of Facts Occurring After Lehrman Ceased Operating the Station.*

Petitioner makes the statement that all of the evidence of future net profit potential was based on "events, facts, and business developments" which occurred after Lehrman ceased operating the station. By "events, facts, and business developments" it appears that Petitioner means evidence of expenses relating to the Temple station.

Even if Petitioner's assessment was literally correct it would hardly constitute a valid objection. To the contrary, when loss of "future" net profits are measured, the most

pertinent evidence is that of expense figures, etc. occurring during the projected period i.e., after the business closes (if such are available). But it is not correct. Mr. Brown testified that expense figures taken from the Temple station were not used exactly, but correlated with Mr. Lehrman's figures and with figures from other stations with which he had dealings. Mr. Brown took ordinary expense items, on an annual basis, and divided by 12, in order to get a monthly average to use as a basis for the projection. App. Vol. I, p. 254.[5]

Gulf states that the Temple station, identified as "Bill Brown's Gulf Service Station Business", did not even come into existence until February of 1968. There is testimony from Mr. C. D. Brown, a retired Gulf distributor, that the station opened operations under Bill Brown in February 1968, but he also testified on cross examination that the station had been in existence long prior to that time, and had three previous dealers. It is apparent that since these figures were correlated to Mr. Lehrman's actual expense figures, and the actual expense figures are in the record, there could be no possible error in allowing their use in the projection.

Petitioner cites *Standard Oil of California v. Moore*, *supra* for the holding that testimony as to damages was inadmissible when it was based "in part upon certain events, facts, and business developments subsequent to" the date Moore's service station business was destroyed. However, Petitioner does not discuss the "facts, events and business developments" considered in *Moore*. When the opinion is examined it is apparent that it has no bearing upon this case.

This point likewise has no merit.

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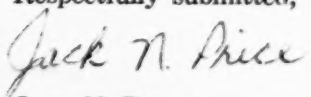
[5] Mr. Brown first testified to the basic projection figures in the first trial. Mr. Lehrman went out of business in late 1967. Therefore, any charge of taking into account "events", etc. occurring after Lehrman ceased operations applies to a very short period immediately after Lehrman left the station.

CONCLUSION

For the reasons set forth above, the Petition for writ of certiorari should be denied.

Respectfully submitted,



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